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Physicians and Surgeons

Harry B. Hutchins

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PHYSICIANS AND SURGEONS

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I. DEFINITIONS.[1]

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1. **"Animal magnetism"** see Parks *v.* State, 159 Ind. 211, 226, 64 N. E. 862, 59 L. R. A. 190.
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"Massage" see Territory *v.* Newman, (N. M. 1905) 79 Pac. 813, 815.
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"Medical attendance" defined see 27 Cyc. 465 note 7.
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"Operation" defined see 29 Cyc. 1497.
"Ordinary knowledge and skill" see Jones *v.* Angell, 95 Ind. 376, 382.
"Other agency" see *infra*, II, C, 1, a, (II), note 33.
"Practice of medicine and surgery" see *infra*, II, C, 1, a, (I), (A); and 27 Cyc. 466 note 19. "The practice of medicine includes the application and use of medicines and drugs for the purpose of curing, mitigating, or alleviating bodily diseases." Bouvier L. Dict. [*quoted* in Territory *v.* Newman, (N. M. 1905) 79 Pac. 813, 814]. "The practice of surgery is limited to manual operations usually performed by surgical instruments or appliances." Bouvier L. Dict. [*quoted* in Territory *v.* Newman, (N. M. 1905) 79 Pac. 813, 814]. "'The practice of medicine' . . . means (1) to open an office for the practice of medicine; or (2) to announce to the public or to any individual, in any way, a desire or willingness or readiness to treat the sick or afflicted, or investigate or diagnose, or offer to investigate or diagnose, any physical or medical ailments or disease of any person; or (3) to suggest, recommend, prescribe, or direct for the use of any person any drug, medicine, appliance, or other agency, whether material or not material, for the use, relief, or palliation of any ailment or disease of the mind or body, or the cure or relief of any wound, fracture, or bodily injury or deformity, after having re-

lawfully engaged in the practice of medicine.[2] The word in its popular sense means one who professes or practises medicine, or the healing art; a doctor of medicine.[3] The term includes all who practise physic or surgery and is not

ceived or with the intent to receive therefor, either directly or indirectly, any bonus, gift, or compensation." Territory *v.* Newman, (N. M. 1905) 79 Pac. 706.

"Practising medicine" see *infra*, II, C, 2, a, (I), note 64. "Any person shall be held, on practising medicine, surgery, or obstetrics, to be a physician . . . or who shall publicly profess to be a physician, surgeon, or obstetrician, or assume their duties, or who shall make a practice of prescribing, or prescribing and furnishing, medicine for the sick, or who shall publicly profess to cure or heal." Iowa Code (1897), § 2579 [*quoted* in State *v.* Edmunds, 127 Iowa 333, 335, 101 N. W. 431].

"Profession" see Lawson *v.* Conaway, 37 W. Va. 159, 163, 16 S. E. 564, 38 Am. St. Rep. 17, 18 L. R. A. 627.

"Professor" see *infra*, II, C, 1, a, (IV), (A).

"Reasonable" skill see Kendall *v.* Brown, 74 Ill. 232, 237; Jones *v.* Angell, 95 Ind. 376, 382.

"Reputable" see *infra*, II, B, 2, a, (III), (B), (3), (b).

2. Bouvier L. Dict. [*quoted* in Harrison *v.* State, 102 Ala. 170, 173, 15 So. 563; Territory *v.* Newman, (N. M. 1905) 79 Pac. 813, 814].

In England physicians are a class of persons who have a diploma from a college of physicians and are entitled to the honorary distinction of doctor of medicine. See Graham *v.* Gautier, 21 Tex. 111, 117; Hunter *v.* Clare, [1899] 1 Q. B. 635, 641, 63 J. P. 308, 68 L. J. Q. B. 278, 80 L. T. Rep. N. S. 197, 47 Wkly. Rep. 394.

By statute a physician or surgeon has been defined to be "one who prescribes or administers medicine for, or in any manner treats, diseases or wounds, for pay" (Richardson *v.* State, 47 Ark. 562, 564, 2 S. W. 187); "a person skilled in both medicine and surgery" (Minn. Rev. Laws (1905), §§ 2295–2300 [*quoted* in Goss *v.* Goss, 102 Minn. 346, 351, 113 N. W. 690].

3. Worcester Dict. [*quoted* in Harrison *v.* State, 102 Ala. 170, 173, 15 So. 563; Whitlock *v.* Com., 89 Va. 337, 338, 15 S. E. 893].

Other definitions are: "One authorized to prescribe remedies for and treat diseases; a doctor of medicine." Webster Dict. [*quoted* in Sutton *v.* Facey, 1 Mich. 243, 247; State *v.* McMinn, 118 N. C. 1259, 1261, 24 S. E. 523].

"One who practices the art of healing disease and preserving health; a prescriber of remedies for sickness and disease." State *v.* Beck, 21 R. I. 288, 291, 43 Atl. 366, 45 L. R. A. 269.

"One qualified and authorized to prescribe remedies for diseases." Prowitt *v.* Denver, 11 Colo. App. 70, 52 Pac. 286, 287.

"One skilled in both medicine and surgery." Castner *v.* Sliker, 33 N. J. L. 507, 510.

"One who is versed in medical science, a branch of which is surgery." Goss *v.* Goss, 102 Minn. 346, 351, 113 N. W. 690.

Synonymous terms.—"Doctor," "person practising medicine," and "physician" are often used as synonymous and interchangeably. Harrison *v.* State, 102 Ala. 170, 172, 15 So. 563. See also Corsi *v.* Maretzak, 4 E. D. Smith (N. Y.) 1, 7.

"County physician" see People *v.* Shearer, 143 Cal. 66, 67, 76 Pac. 813.

"Doctor" see *infra*, II, C, 1, a, (IV), (A).

"Dr." see *infra*, II, C, 1, a, (IV), (A), note 38.

"Employee" as including a physician see 15 Cyc. 1033 text and note 57.

"Family physician" defined see 19 Cyc. 455.

"Itinerant doctors" see Cherokee *v.* Perkins, 118 Iowa 405, 407, 92 N. W. 68.

"Itinerant physicians" see Cherokee *v.* Perkins, 118 Iowa 405, 406, 92 N. W. 68. See also Iowa Code (1897), § 2579 [*quoted* in State *v.* Edmunds, 127 Iowa 333, 335, 101 N. W. 431]. An itinerant physician has been defined to be one who travels from place to place, pursuing his vocation in an itinerant method. Hairston *v.* State, 36 Tex. Cr. 470, 471, 37 S. W. 858. Under the Iowa code defining an itinerant physician as a physician practising medicine, or professing to heal diseases by any medicine, appliance, or method, who goes from place to place, a nonresident who goes from place to place, professing to cure diseases by dieting his patients, prescribing exercises, and furnishing them with glasses, is an itinerant physician. State *v.* Edmunds, 127 Iowa 333, 335, 101 N. W. 431.

"Laborer" does not include a physician. Weymouth *v.* Sanborn, 43 N. H. 171, 173, 80 Am. Dec. 144.

"M. D." see 26 Cyc. 1606.

"Physicians in good standing" see Lawson *v.* Conaway, 37 W. Va. 159, 163, 16 S. E. 564, 38 Am. St. Rep. 17, 18 L. R. A. 627.

"Regular physician" see Bradbury *v.* Bardin, 35 Conn. 577, 581.

Specialist traveling from place to place.—A physician residing in one town and maintaining an office in another, in which he practises medicine as a specialist, is not a specialist traveling from place to place, within the meaning of Sp. Sess. Laws (1897), p. 51, subd. 13, requiring a physician traveling from place to place as a specialist to pay an occupation tax. Adams *v.* State, 45 Tex. Cr. 566, 78 S. W. 935; Broiles *v.* State, (Tex. Cr. App. 1902) 68 S. W. 685; Hairston *v.* State, 36 Tex. Cr. 470, 37 S. W. 858.

"Tradesmen" as including a physician see Woodfield *v.* Colzey, 47 Ga. 121, 124.

"Traveling physician" see Adams *v.* State, 45 Tex. Cr. 566, 567, 78 S. W. 935.

[I, A]

limited to any one school of practitioners. It therefore includes a homeopath.[4] In its broad sense the term "physician" includes a dentist,[5] but it has been held that a dentist is not a "physician or surgeon" within the meaning of those words as used in various state statutes.[6]

B. Surgeon. A surgeon is a practitioner who treats injuries, deformities, or disorders by mechanical operations.[7]

C. Veterinary Surgeon. A veterinary surgeon is a person lawfully practising the art of treating and healing injuries and diseases of domestic animals.[8]

D. Dentist. A dentist is a dental surgeon;[9] one who performs manual or mechanical operations to preserve teeth, to cleanse, extract, insert, or repair them.[10]

E. Surgery. Surgery is a branch of medical science.[11] It is limited to manual operations usually performed by surgical instruments or appliances.[12]

F. Malpractice. Malpractice, in its ordinary sense, is the negligent performance by a physician or surgeon of the duties which are devolved and incumbent upon him on account of his contractual relations with his patient.[13]

G. Osteopathy. Osteopathy is defined as a method of treating diseases of the human body without the use of drugs, by means of manipulations applied to various nerve centers — chiefly those along the spine — with a view to inducing free circulation of the blood and lymph, and an equal distribution of the nerve forces.[14]

4. Corsi *v.* Maretzek, 4 E. D. Smith (N. Y.) 1, 5; Raynor *v.* State, 62 Wis. 289, 300, 22 N. W. 430.

5. *In re* Hunter, 60 N. C. 372.

6. People *v.* De France, 104 Mich. 563, 62 N. W. 709, 28 L. R. A. 139 (holding that a dentist is not a surgeon within a statute providing that communications to persons authorized to practise medicine or surgery shall be privileged); State *v.* Fisher, 119 Mo. 344, 353, 24 S. W. 167, 22 L. R. A. 799 (holding that a dentist is not a physician or surgeon within a statute exempting a practitioner of medicine or surgery from jury duty); State *v.* McMinn, 118 N. C. 1259, 24 S. E. 523 (holding that a dentist is not a physician within a statute protecting one who sells intoxicating liquor on Sunday on the prescription of a physician). See also Cherokee *v.* Perkins, 118 Iowa 405, 92 N. W. 68.

7. Standard Dict.

A surgeon is a physician who treats bodily injuries and ills by manual operations and the use of surgical instruments and appliances. Goss *v.* Goss, 102 Minn. 346, 351, 113 N. W. 690.

In England a surgeon is a practitioner who holds a diploma from the Royal College of Surgeons, but who has not the degree of M. D. See Standard Dict.

"Itinerant surgeons" see Cherokee *v.* Perkins, 118 Iowa 405, 406, 92 N. W. 68.

The word "physician" includes not only doctors who administer medicine and physic, but surgeons, who, by a knowledge of the nature and structure of the human system, are able to amputate an injured and diseased limb, or to extract a ball with skill and as much safety to life and as little pain as the case admits of. *In re* Hunter, 60 N. C. 372, 373.

8. Lyford *v.* Martin, 79 Minn. 243, 244, 82 N. W. 479.

9. State *v.* Beck, 21 R. I. 288, 293, 43 Atl. 366, 45 L. R. A. 269.

10. People *v.* De France, 104 Mich. 563, 570, 62 N. W. 709, 28 L. R. A. 139; State *v.* McMinn, 118 N. C. 1259, 1261, 24 S. E. 523. See also *infra*, II, C, 1, b.

"Physician" as including a dentist see *In re* Hunter, 60 N. C. 372, 373. As not including a dentist see People *v.* De France, 104 Mich. 563, 570, 62 N. W. 709, 28 L. R. A. 139; State *v.* McMinn, 118 N. C. 1259, 1261, 24 S. E. 523.

11. U. S. *v.* Massachusetts General Hospital, 100 Fed. 932, 938, 41 C. C. A. 114.

Surgery is therapy of a distinctly operative kind. Stewart *v.* Raab, 55 Minn. 20, 21, 56 N. W. 256.

12. Nelson *v.* State Bd. of Health, 108 Ky. 769, 779, 57 S. W. 501, 22 Ky. L. Rep. 438, 50 L. R. A. 383.

13. Tucker *v.* Gillette, 22 Ohio Cir. Ct. 664, 670, 12 Ohio Cir. Dec. 401; Town *v.* Archer, 4 Ont. L. Rep. 383, 387.

Malpractice defined elsewhere see 26 Cyc. 121.

"Maltreatment" defined see 26 Cyc. 121.

14. Parks *v.* State, 159 Ind. 211, 229, 64 N. E. 862, 59 L. R. A. 190. See also *infra*, II, C, 1, a, (III).

The practice of osteopathy consists principally in rubbing, pulling, and kneading with the hands and fingers certain portions of the body, and flexing and manipulating the limbs of those afflicted with disease, the object of such treatment being to remove the cause or causes of trouble. Little *v.* State, 60 Nebr. 749, 751, 84 N. W. 248, 51 L. R. A. 717. See also Nelson *v.* State Bd. of Health, 108 Ky. 769, 57 S. W. 501, 22 Ky. L. Rep. 438, 50 L. R. A. 383; State *v.* Liffring, 61 Ohio St. 39, 55 N. E. 168, 76 Am. St. Rep. 358, 46 L. R. A. 334; Com. *v.* Pierce, 10 Pa. Dist. 335.

H. Ophthalmology. Ophthalmology is the science which treats of the physiology, anatomy, and diseases of the eye.[15]

II. RIGHT TO PRACTISE MEDICINE AND SURGERY.[16]

A. Power to Regulate Practice. It is well settled that under the police power inherent in the state, the legislature may enact reasonable regulations for the examination and registration of physicians, and the practice of medicine and surgery,[17] and such statutes violate neither the federal nor the state constitutions.[18] Similar statutes have been sustained for the regulation of the practice of den-

"Physician" in the statutes in reference to the practice of medicine does not include an osteopath, as osteopathy teaches neither therapeutics, materia medica, surgery, nor bacteriology, but rests entirely upon manipulation of the body for the cure of disease. Nelson v. State Bd. of Health, 108 Ky. 769, 57 S. W. 501, 504, 22 Ky. L. Rep. 438, 441, 50 L. R. A. 383.

15. State v. Yegge, 19 S. D. 234, 235, 103 N. W. 17, 18, 69 L. R. A. 504.

"Ophthalmoscope" defined see 29 Cyc. 1499.

16. **Injunction against board of health in relation to physicians see** INJUNCTIONS, 22 Cyc. 881 note 73.

17. *Arkansas.*— State v. McCrary, (1906) 92 S. W. 775; Thompson v. Van Lear, 77 Ark. 506, 92 S. W. 773, 5 L. R. A. N. S. 588; Richardson v. State, 47 Ark. 562, 2 S. W. 187.

District of Columbia.— Czarra v. Board of Medical Sup'rs, 25 App. Cas. 443.

Indiana.— State v. Webster, 150 Ind. 607, 50 N. E. 750, 41 L. R. A. 212.

Michigan.— People v. Reetz, 127 Mich. 87, 86 N. W. 396.

Minnesota.— State v. State Medical Examining Board, 32 Minn. 324, 20 N. W. 238, 50 Am. Rep. 575.

Montana.— State v. First Judicial Dist. Ct. Dept. No. 2, 26 Mont. 121, 66 Pac. 754.

Nebraska.— Lincoln Medical College v. Poynter, 60 Nebr. 228, 82 N. W. 855, holding that the law governing the practice of medicine and authorizing the state board of health to issue certificates to physicians and surgeons is a police measure, and was not intended to protect medical schools or medical practitioners from competition in business.

New Mexico.— *In re* Roe Chung, 9 N. M. 130, 49 Pac. 952.

New York.— People v. Fulda, 52 Hun 65, 4 N. Y. Suppl. 945.

Ohio.— State v. Marble, 72 Ohio St. 21, 73 N. E. 1063.

Pennsylvania.— Com. v. Wilson, 6 Pa. Dist. 628, 19 Pa. Co. Ct. 521; Com. v. Densten, 30 Pa. Super. Ct. 631.

United States.— Dent v. West Virginia, 129 U. S. 114, 9 S. Ct. 231, 32 L. ed. 623.

See 39 Cent. Dig. tit. "Physicians and Surgeons," § 1.

The practice of medicine is a mere privilege, on the exercise of which the state may impose such conditions as it deems advisable. State v. Edmunds, 127 Iowa 333, 101 N. W. 431; Allopathic State Bd. of Medical Examiners v. Fowler, 50 La. Ann. 1358, 24 So. 809.

An act forbidding physicians and surgeons to solicit patients through paid agents is a valid police regulation. State v. McCreary, (Ark. 1906) 92 S. W. 775; Thompson v. Van Lear, 77 Ark. 506, 92 S. W. 773, 5 L. R. A. N. S. 588.

The right of a state to enact such laws proceeds from its inherent power to prescribe such rules as will protect the health and safety of the people. Driscoll v. Com., 93 Ky. 393, 20 S. W. 431, 703, 14 Ky. L. Rep. 376; State v. Vandersluis, 42 Minn. 129, 43 N. W. 789, 6 L. R. A. 119; State v. State Medical Examining Bd., 32 Minn. 324, 20 N. W. 238, 50 Am. Rep. 575; Com. v. Irving, 1 Leg. Chron. (Pa.) 69; Antle v. State, 6 Tex. App. 202.

Statutes liberally construed.— A statute imposing a fine or imprisonment on one practising medicine without a license is to be liberally construed, so as to reasonably effectuate its purpose to prevent fraud, and to conserve the public health. State v. Oredson, 96 Minn. 509, 105 N. W. 188.

18. *Alabama.*— Bragg v. State, 134 Ala. 165, 32 So. 767, 58 L. R. A. 925.

California.— *Ex p.* McNulty, 77 Cal. 164, 19 Pac. 237, 11 Am. St. Rep. 257.

Indiana.— Spurgeon v. Rhodes, 167 Ind. 1, 78 N. E. 228.

Iowa.— State v. Kendig, 133 Iowa 164, 110 N. W. 463; State v. Wilhite, 132 Iowa 226, 109 N. W. 730.

Kansas.— State v. Creditor, 44 Kan. 565, 24 Pac. 346, 21 Am. St. Rep. 306.

Kentucky.— Wilson v. Com., 119 Ky. 769, 82 S. W. 427, 26 Ky. L. Rep. 685.

Maine.— State v. Bohemier, 96 Me. 257, 52 Atl. 643.

Minnesota.— State v. State Medical Examining Bd., 32 Minn. 324, 20 N. W. 238, 50 Am. Rep. 575.

Montana.— State v. First Judicial Dist. Ct., 26 Mont. 121, 66 Pac. 754.

Ohio.— State v. Marble, 72 Ohio St. 21, 73 N. E. 1063, 106 Am. St. Rep. 570, 70 L. R. A. 835; State v. Morrill, 7 Ohio S. & C. Pl. Dec. 52, 5 Ohio N. P. 133; State v. Ottman, 6 Ohio S. & C. Pl. Dec. 265, 4 Ohio N. P. 195.

Pennsylvania.— Com. v. Densten, 217 Pa. St. 423, 66 Atl. 653; Com. v. Taylor, 2 Kulp 364.

Tennessee.— O'Neil v. State, 115 Tenn. 427, 90 S. W. 627, 3 L. R. A. N. S. 762.

tistry.[19] The authority of the legislature does not end with declaring what qualifications he who enters upon the practice of that profession shall possess. As it has plenary power over the whole subject, it alone must be the judge of what is expedient, both as to the qualifications required and as to the method of ascertaining those qualifications.[20] The only limit to the legislative power in prescribing conditions to the right to practise is that they shall be reasonable;[21] and whether they are reasonable the courts must judge.[22] If the regulations and conditions are adopted in good faith, and they operate equally upon all who desire to practise and who possess the required qualifications,[23] and if they are appropriate to the end in view, to wit, the protection of the public, and attainable by reasonable study or application,[24] then the fact that the conditions may be rigorous will not render the legislation invalid. In the enactment of legislation of this character the legislature may take account of the advance of learning, and impose new conditions and qualifications as increased knowledge may suggest;[25] and to make such legislation effective, one having an established practice and one contemplating practising may be required to conform to the same standard of qualification.[26]

B. Requirements — 1. In General. The qualifications prescribed by the several states to entitle one to enter upon the practice of medicine and surgery may be generally classified as follows: (1) The candidate must have a diploma from a medical college in good standing, and, in addition, must pass a satisfactory examination before a board of examiners. (2) The candidate must pass a satisfactory examination as in the first class, but is not required to have a diploma. (3) The

Wisconsin.— State *v.* Currens, 111 Wis. 431, 87 N. W. 561, 56 L. R. A. 252.

United States.— Dent *v.* West Virginia, 129 U. S. 114, 9 S. Ct. 231, 32 L. ed. 623.

See 39 Cent. Dig. tit. "Physicians and Surgeons," § 2. See also Constitutional Law, 8 Cyc. 900 note 837, 1046 note 91, 1055 note 73.

Such a statute is not prohibitive in its effect, and therefore void, but merely regulates the practice. Little *v.* State, 60 Nebr. 749, 84 N. W. 248, 51 L. R. A. 717.

19. Gosnell *v.* State, 52 Ark. 228, 12 S. W. 392; *Ex p.* Whitley, 144 Cal. 167, 77 Pac. 879; Kettles *v.* People, 221 Ill. 221, 77 N. E. 472; State *v.* Vandersluis, 42 Minn. 129, 43 N. W. 789, 6 L. R. A. 119; State *v.* Chapman, 69 N. J. L. 464, 55 Atl. 94 [*affirmed* in 70 N. J. L. 339, 57 Atl. 1133]; Com. *v.* Gibson, 7 Pa. Dist. 386; State *v.* Sexton, 37 Wash. 110, 79 Pac. 634; *In re* Thompson, 36 Wash. 377, 78 Pac. 899; State *v.* Dental Examiners Bd., 31 Wash. 492, 72 Pac. 110.

20. Gosnell *v.* State, 52 Ark. 228, 12 S. W. 392; Wilkins *v.* State, 113 Ind. 514, 16 N. E. 192; State *v.* Creditor, 44 Kan. 565, 24 Pac. 346, 21 Am. St. Rep. 306; Dent *v.* West Virginia, 129 U. S. 114, 9 S. Ct. 231, 32 L. ed. 623.

21. State *v.* Vandersluis, 42 Minn. 129, 43 N. W. 789, 6 L. R. A. 119.

If a condition is clearly arbitrary and capricious; if no reason with reference to the end in view can be assigned for it; and especially if it appears that it must have been adopted for some other purpose — such as to favor or benefit some person or class of persons — it will be held unreasonable and beyond the power of the legislature to impose. State *v.* Vandersluis, 42 Minn. 129, 43 N. W. 789, 6 L. R. A. 119; State *v.* Gravett, 65 Ohio St. 289, 62 N. E. 325, 87 Am. St. Rep. 605, 55 L. R. A. 791.

"Managing" dental business as distinguished from "practising."— A statute in so far as it requires examination by and a license from a dental board before one may "own, run, or manage" a dental office, as distinguished from the actual practice of dentistry, is not a proper exercise of the police power, but is unconstitutional. State *v.* Brown, 37 Wash. 97, 79 Pac. 635, 107 Am. St. Rep. 798, 68 L. R. A. 889. See also Saunders *v.* Taylor, 5 Lack. Leg. N. (Pa.) 153.

22. State *v.* Vandersluis, 42 Minn. 129, 43 N. W. 789, 6 L. R. A. 119.

23. State *v.* Chapman, 69 N. J. L. 464, 55 Atl. 94; State *v.* Creditor, 44 Kan. 565, 24 Pac. 346, 21 Am. St. Rep. 306.

If the statutes do not discriminate between the different schools of medicine, but merely exact that the practitioner of whatever school shall have a certificate from the board of medical examiners, and shall exercise the skill usually possessed by practitioners in good standing of that school, they are valid. State *v.* Heath, 125 Iowa 585, 101 N. W. 429; Stone *v.* State, 48 Tex. Cr. 114, 86 S. W. 1029.

24. State *v.* Vandersluis, 42 Minn. 129, 43 N. W. 789, 6 L. R. A. 119; State *v.* Currens, 111 Wis. 431, 87 N. W. 561, 56 L. R. A. 252; Dent *v.* West Virginia, 129 U. S. 114, 9 S. Ct. 231, 32 L. ed. 623.

25. State *v.* Gravett, 65 Ohio St. 289, 62 N. E. 325, 87 Am. St. Rep. 605, 55 L. R. A. 791; Dent *v.* West Virginia, 129 U. S. 114, 9 S. Ct. 231, 32 L. ed. 623.

26. State *v.* Gravett, 65 Ohio St. 289, 62 N. E. 325, 87 Am. St. Rep. 605, 55 L. R. A. 791.

candidate may either present an acceptable diploma, or, if he has no diploma, he may be examined as to his qualifications. (4) The applicant must hold a diploma issued by a reputable medical college, which must be satisfactorily shown to belong to him.[27]

2. LICENSE OR CERTIFICATE — a. In General — (I) *NECESSITY* — (A) *In General.* Formerly no license or certificate was required of a person who undertook the practice of medicine. A diploma of an incorporated medical college was looked upon as furnishing the necessary qualification for a person to engage in the practice of such profession. The result was that many persons engaged in the practice of medicine who had acquired no scientific knowledge with reference to the character of diseases or of the ingredients of drugs that they administered, some of whom imposed upon the public by purchasing diplomas from fraudulent concerns and advertising them as real. This resulted in the adoption of statutes upon the subject, and now in most of the states the medical laws provide that, before any person can practise medicine in any of its departments in the state, he must apply for and receive a certificate of qualification or license from the state board of medical examiners.[28] A license and a certificate have been held not to be the same thing.[29] A statute providing that no person, unless previously registered or licensed to practise medicine or dentistry, "shall begin" the practice of medicine or dentistry without obtaining a license is applicable to one who continued after the act took effect, an illegal practice previously begun.[30]

(B) *In County of Residence or Practice.* Under some statutes a physician or dentist, changing his residence from one county to another, must obtain a new license in the county where he proposes to reside, and it is unlawful for him to practise in such county without such license.[31] Under other statutes a license from any board of the state will entitle the holder to practise throughout the state.[32]

27. Taylor Physicians 10, 11. See also the statutes of the several states; these will be found epitomized in "Laws Regulating the Practice of Medicine in United States and Elsewhere," published by the American Medical Association.

28. See the statutes of the several states. And see Harding *v.* People, 10 Colo. 387, 15 Pac. 727; Dowdell *v.* McBride, 18 Tex. Civ. App. 645, 45 S. W. 397 (holding that under Rev. St. (1895) tit. 82, providing for the appointment of boards of examiners, whose certificates shall entitle the holder to practise medicine, a compliance with the law is necessary to enable one to practise medicine, although an express provision to that effect contained in a former enactment on the subject is not contained in the later statute); Stone *v.* State, 48 Tex. Cr. 114, 86 S. W. 1029.

In Alabama Code (1886), §§ 1296–1298 provide that a graduate of a medical college in the United States, whose diploma is recorded, may practise medicine without a license in any county having only a medical board established by the county commissioners; but where there is a board of medical examiners, organized according to the constitution of the state medical association, and in affiliation with it, a license or certificate of qualification from such board is necessary. Section 4078 provides for the punishment of any person practising medicine without a license, diploma, or certificate, or who is not "a regular graduate of a medical college of this State, having had his diploma legally recorded." It was held that a graduate of a medical college of another state whose diploma is recorded is not indictable for practising without license or certificate from a board of medical examiners in the county, organized under or in affiliation with the state association. Stough *v.* State, 88 Ala. 234, 7 So. 150; Brooks *v.* State, 88 Ala. 122, 6 So. 902.

In Kentucky the law of May 10, 1886, requiring every person desiring to practise dentistry to obtain a certificate of qualification from the board of examiners of the Kentucky Dental Association, was not repealed by the law of May 1, 1893 (St. § 459), requiring such a certificate to be obtained by those who desire to begin the practice after that date, and requiring all persons theretofore holding such certificates to have them registered; and therefore one who now practises dentistry without having obtained such a certificate may be punished therefor, although he began the practice prior to May 1, 1893. Com. *v.* Basham, 101 Ky. 170, 40 S. W. 253, 19 Ky. L. Rep. 336.

29. Nelson *v.* State, 97 Ala. 79, 12 So. 421.

"Certificate" defined see 6 Cyc. 728.

"License" defined see LICENSES, 25 Cyc. 597.

30. Kettles *v.* People, 221 Ill. 221, 77 N. E. 472; Hooper *v.* Batdorff, 141 Mich. 353, 104 N. W. 667.

31. Mayfield *v.* Nale, 26 Ind. App. 240, 59 N. E. 415.

In other words a person engaged in the practice of medicine must procure a license in each county where he practises. Orr *v.* Meek, 111 Ind. 40, 11 N. E. 787.

32. Derrick *v.* State, 34 Tex. Cr. 21, 28 S. W. 818.

(II) *Sufficiency.* Under a statute requiring a license from some chartered school, state board of medical examiners, or medical society, neither a certificate showing that the holder has passed a limited course of study, nor a limited commission for the practice of medicine within a limited sphere, is sufficient.[33] Where a statute requiring an applicant to obtain a license or certificate further requires that such license or certificate shall be indorsed or countersigned by a particular officer before it shall become valid, a license or certificate not so indorsed or countersigned is insufficient to authorize the holder to practise medicine.[34]

(III) *Authority to Issue* — (A) *In General.* The power of the legislature to require an applicant to pass an examination and obtain a license as a condition to his right to practise medicine in the state includes the right to select the particular agency to whom the duty of conducting the examination and granting the license shall be delegated.[35]

(B) *Medical Boards* — (1) In General. This agency is usually called the state medical board or board of medical examiners. Where the statute does not require that the different schools of medicine shall be represented on the board, its composition cannot affect its jurisdiction or the legality of its acts.[36] A statute creating such a board to be composed of members of a particular school of medicine is not unconstitutional on the ground of discrimination.[37] Nor is an act unconstitutional in not providing that each school of medicine should be represented by equal numbers on the board.[38] The fact that the board was not regularly organized is immaterial;[39] if it is the *de facto* board its certificate protects the holder from prosecution.[40]

(2) Nature of Power. The authority of a state medical or dental board in granting or refusing licenses to applicants, or in passing on the reputability of colleges, is neither legislative nor judicial, but quasi-judicial, involving the exercise of judgment and discretion.[41] The ascertainment and determination of qualifica-

33. People *v.* Fulda, 52 Hun (N. Y.) 65, 4 N. Y. Suppl. 945, holding that neither a certificate from a medical school in Prussia that defendant had there passed a limited course of study, nor a commission, after examination therefor, as a medical officer in a regiment in the volunteer army, is such a license to practice medicine as is required by Pen. Code, § 356.

34. Brooks *v.* State, 146 Ala. 153, 41 So. 156 (requirement that all medical certificates issued by county boards of examiners be countersigned by the senior censor of the state medical association); Nicholson *v.* State, 100 Ala. 132, 14 So. 746 (requirement that certificate be indorsed and sealed by probate judge and recorded).

35. Allopathic State Bd. of Medical Examiners *v.* Fowler, 50 La. Ann. 1358, 24 So. 809; Weeden *v.* Arnold, 5 Okla. 578, 49 Pac. 915, holding that the superintendent of public health of the territory of Oklahoma is the proper officer to issue a license to an applicant as a practising physician, and it is not the duty of the board of public health to issue such license.

36. Iowa Eclectic Medical College Assoc. *v.* Schrader, 87 Iowa 659, 55 N. W. 24, 20 L. R. A. 355.

37. Allopathic State Bd. of Medical Examiners *v.* Fowler, 50 La. Ann. 1358, 24 So. 809; Dowdell *v.* McBride, 92 Tex. 239, 47 S. W. 524; Kenedy *v.* Schultz, 6 Tex. Civ. App. 461, 25 S. W. 667.

38. Brown *v.* People, 11 Colo. 109, 17 Pac. 104.

39. Bragg *v.* State, 134 Ala. 165, 32 So. 767, 58 L. R. A. 925.

Failure to appoint members within time limited.— Failure of the governor to appoint the members of a board of medical examiners within one month after the passage of the act creating such board, as required thereby, does not invalidate the appointments subsequently made, since the requirement as to time is merely directory. People *v.* Hasbrouck, 11 Utah 291, 39 Pac. 918.

Failure to notify member of time and place of organization.— Under an act to regulate the practice of medicine, which does not impose on any member of the board of medical examiners the duty of notifying the others of the time and place of organization of the board, a failure to give such notice to a member will not afford sufficient ground to restrain the board, when organized, from discharging its proper functions under the law as a board of examiners. Howard *v.* Parker, 49 Tex. 236.

40. Bragg *v.* State, 134 Ala. 165, 32 So. 767, 58 L. R. A. 925; Brown *v.* People, 11 Colo. 109, 17 Pac. 104.

41. *California.*— Van Vleck *v.* State Bd. of Dental Examiners, (1897) 48 Pac. 223.

Idaho.— Raaf *v.* State Bd. of Medical Examiners, 11 Ida. 707, 84 Pac. 33.

Illinois.— People *v.* Illinois State Bd. of Dental Examiners, 110 Ill. 180.

tions to practise medicine by a board of experts appointed for that purpose is not the exercise of "judicial power," as that phrase is used in conferring judicial power upon specified courts,[42] although the statute provides for an appeal therefrom;[43] and therefore a statute authorizing a state medical board to ascertain and determine the qualifications of applicants to practise medicine is not unconstitutional as conferring judicial power on the board.[44]

(3) AUTHORITY AND POWERS — (a) IN GENERAL. A state medical board has full authority to prescribe rules and regulations governing the issuance of certificates of medical practitioners.[45] An existing board, however, has no power to review the action of a former board.[46]

(b) TO DETERMINE REPUTABILITY OF INSTITUTION GRANTING DIPLOMA.[47] The requirement that a medical or dental board shall issue to the holder of a diploma a certificate entitling him to practise medicine or dentistry is almost universally upon the express condition that the diploma shall be from a "reputable" institution, or an institution "in good standing." Whether a college be reputable or in good standing is not a legal question but a question of fact,[48] and is usually left to the judgment and discretion of the state medical or dental board,[49] unless the status

Kansas.— Meffert *v.* State Bd. of Medical Registration, etc., 66 Kan. 710, 72 Pac. 247, 1 L. R. A. N. S. 911.

New Hampshire.— Brown *v.* Grenier, 73 N. H. 426, 62 Atl. 590.

Tennessee.— Williams *v.* State Bd. of Dental Examiners, 93 Tenn. 619, 27 S. W. 1019.

Wisconsin.— State *v.* Chittenden, 127 Wis. 468, 107 N. W. 500.

42. State *v.* Webster, 150 Ind. 607, 50 N. E. 750, 41 L. R. A. 212; People *v.* Hasbrouck, 11 Utah 291, 39 Pac. 918.

43. State *v.* Webster, 150 Ind. 607, 50 N. E. 750, 41 L. R. A. 212.

44. *Ex p.* Whitley, 144 Cal. 167, 77 Pac. 879; People *v.* Hasbrouck, 11 Utah 291, 39 Pac. 918.

45. Brooks *v.* State, 146 Ala. 153, 41 So. 156.

It has power, by proper investigation, to determine the identity of applicants, the genuineness of diplomas, and whether they were issued by a school legally organized and in good standing. Iowa Eclectic Medical College Assoc. *v.* Schrader, 87 Iowa 659, 55 N. W. 24, 20 L. R. A. 355. The power relates to reasonable administration of matters appertaining to the public welfare, not to interferences with the internal management of medical or dental colleges. State *v.* Chittenden, 127 Wis. 468, 107 N. W. 500. *Compare* Iowa Eclectic Medical College Assoc. *v.* Schrader, 87 Iowa 659, 55 N. W. 24, 20 L. R. A. 355, holding that the board has power to adopt a schedule of requirements as to the qualifications of students on entering a school, branches to be taught, how to be taught, length of course, and attendance, and facilities for teaching. But it has been held that the law does not authorize the board to invade the private affairs of a medical or dental college in respect to its rates of tuition, or whether it shall grant concessions from advertised rates, or by taking charge, *in invitum*, of its examinations as to entrance qualifications. State *v.* Chittenden, 127 Wis. 468, 107 N. W. 500.

46. Miller *v.* Medical Bd., 33 Oreg. 5, 52 Pac. 763, holding that when a state board of medical examiners, having power to grant a license upon a diploma alone, have passed upon the diploma of an applicant for a license, refusing the same, and are succeeded by a new and distinct board, not having the power to license without an examination, they cannot review, upon a second application, the decision of the former board, or grant a license upon the diploma alone, without an examination.

47. Authority of medical college to confer degrees or diplomas see COLLEGES AND UNIVERSITIES, 7 Cyc. 289.

48. People *v.* Illinois State Bd. of Dental Examiners, 110 Ill. 180.

The word "reputable," as thus used, means "reputable" in the general sense in which the term is ordinarily used; worthy of repute or distinction, held in esteem, honorable, praiseworthy. State *v.* Chittenden, 127 Wis. 468, 107 N. W. 500; State *v.* Chittenden, 112 Wis. 569, 88 N. W. 587. The board must determine whether a diploma comes from a reputable source as an independent fact, considering the term "reputable" in its ordinary sense and measuring the character of the college from the standpoint of men competent to judge thereof by reason of their scientific attainments in the line of work for which such a college stands. State *v.* Chittenden, 112 Wis. 569, 88 N. W. 587.

Reputability of a dental college relates to that which will enable the college to do good work, and the actual accomplishment; it is distinct from other requisites as to a diploma being a passport to the favor of the official board as regards the issuance of a license. It may or may not exist, and all the other requisites be present. State *v.* Chittenden, 127 Wis. 468, 107 N. W. 500, Marshall, J., delivering the opinion of the court.

49. *Illinois.*— Illinois State Bd. of Dental Examiners *v.* People, 123 Ill. 227, 13 N. E. 201; People *v.* Illinois State Bd. of Dental Examiners, 110 Ill. 180; Illinois State Bd. of Health *v.* People, 102 Ill. App. 614.

[II, B, 2, a, (III), (B), (8), (b)]

of such schools and colleges is fixed by statute, in which case the board of examiners has no discretion in regard to determining their reputability.[50] Where the law does not define the method by which the board shall proceed to determine the reputability of a college, such board may perform its duty in that regard in any reasonable way it may deem proper;[51] and the decision of the board in this regard cannot be coerced or reversed by the courts, in the absence of arbitrary and oppressive conduct on the part of the board.[52] The board may adjudicate the status of a medical college as to reputability either of its own motion, or on petition of the

Missouri.— State *v.* Lutz, 136 Mo. 633, 38 S. W. 323.

New Jersey.— State *v.* Hudson County Bd. of Health, 53 N. J. L. 594, 22 Atl. 226.

Ohio.— State *v.* Hygeia Medical College, 60 Ohio St. 122, 54 N. E. 86.

Oregon.—Barmore *v.* State Bd. Medical Examiners, 21 Oreg. 301, 28 Pac. 8, holding that the board had a right to define the words "medical institutions in good standing" so as to include only those schools that require for graduation at least three regular sessions of six months each, extending over a period of three years, and to make a further rule that those examined must attain seventy-five per cent.

Tennessee.— Williams *v.* State Bd. of Dental Examiners, 93 Tenn. 619, 27 S. W. 1019.

Wisconsin.— State *v.* Chittenden, 112 Wis. 569, 88 N. W. 587.

See 39 Cent. Dig. tit. "Physicians and Surgeons," § 4.

The character of a school having been once fairly determined by the board, when and under what circumstances a reëxamination of the subject should be made must necessarily rest solely in its discretion so long as it acts reasonably. State *v.* Chittenden, 112 Wis. 569, 88 N. W. 587.

Such power not unconstitutional.— A statute providing that no person shall be eligible for examination by the state board of examiners who shall not furnish satisfactory evidence of having graduated from a reputable college indorsed by the board of examiners is not open to the objection of unconstitutionally conferring arbitrary power on the board of examiners to decide what colleges are reputable (*Ex p.* Whitley, 144 Cal. 167, 77 Pac. 879), or to establish unreasonable rules and regulations (Kettles *v.* People, 221 Ill. 221, 77 N. E. 472).

Power non-delegable.— The discretionary power of determining on the fitness of issuing a license for the practice of dentistry to the graduates of reputable dental colleges, vested in the state board of dental examiners by the Illinois act regulating the practice of dentistry, cannot be delegated by the state board to the national association of dental examiners, an association composed mostly of men residing outside of the state, and holding a convention at the time in New York. Illinois State Bd. of Dental Examiners *v.* People, 123 Ill. 227, 13 N. E. 201.

Burden of proof to show reputability.— When a graduate of a dental college applies to the state board of dental examiners for a license to practise his profession, the burden of proof is on him to establish the reputability of such college. State *v.* Chittenden, 112 Wis. 569, 88 N. W. 587.

What is not "medical college."—A college which teaches osteopathy, a method of treating diseases by kneading or manipulation of the body, and does not teach surgery, bacteriology, materia medica, or therapeutics, is not a "medical college," within the meaning of Ky. St. § 2613, which requires the state board of health to issue a certificate to practise medicine to any reputable physician who has a diploma from a reputable medical college chartered under the laws of this state, or from a reputable and legally chartered medical college of some other state or country, indorsed as such by the state board of health. Nelson *v.* State Bd. of Health, 108 Ky. 769, 57 S. W. 501, 22 Ky. L. Rep. 438, 50 L. R. A. 383.

50. Wise *v.* State Veterinary Bd., 138 Mich. 428, 101 N. W. 562.

An act prescribing the standard of scholarship to be maintained by medical schools, whose diplomas the state board of medical examiners should be authorized to accept, as that prescribed from time to time by an association composed of colleges devoted to the work of preparing persons for the profession, makes the standard sufficiently fixed, definite, and certain. *Ex p.* Gerino, 143 Cal. 412, 77 Pac. 166, 66 L. R. A. 249, Shaw, J., delivering the opinion of the court.

51. State *v.* Chittenden, 112 Wis. 569, 88 N. W. 587.

The board cannot establish a rule of its own by which reputability or good standing shall be shown. State *v.* Lutz, 136 Mo. 633, 38 S. W. 323, holding that the question of good standing cannot be made to depend merely on whether the college has complied with a resolution of the board requiring every medical college, by a certain date, to furnish the board with a list of its matriculates and the basis of their matriculation.

52. Williams *v.* State Bd. of Dental Examiners, 93 Tenn. 619, 27 S. W. 1019. See also Illinois State Bd. of Dental Examiners *v.* People, 20 Ill. App. 457, holding that the discretion vested in the board of examiners cannot be exercised arbitrarily for the gratification of feelings of malevolence, and for the attainment of merely personal and selfish ends.

All questions in regard thereto may be considered at rest till, by lapse of time or otherwise, some reasonable ground exists for believing that its character may probably have changed. State *v.* Chittenden, 112 Wis. 569, 88 N. W. 587.

college,[53] and when it has once determined that question in favor of an applicant, it cannot refuse him a license for arbitrary reasons of its own.[54]

(c) To Refuse License or Certificate For Cause. Boards of medical examiners are generally authorized by statute to refuse certificates to individuals guilty of unprofessional or dishonorable conduct.[55] But an applicant for a license who possesses the requisite medical qualifications cannot be denied a license without a hearing on the question of his character and conduct.[56]

(4) Right to Review Decision of Board.[57] State medical laws sometimes contain a provision authorizing resort to the courts for relief, either by way of appeal or writ of review, against the action of a board of examiners in refusing a license to an applicant.[58] The law usually provides the manner of taking this appeal, but failure to do so does not affect the right.[59] Notice of the appeal should be served upon a member of the board,[60] and where the notice so served is sufficient, it is immaterial whether the board was represented at the trial or not.[61] The board, when aggrieved by the decision of the district court, may appeal or move for a new trial.[62] Pending an appeal from a refusal to grant a license, the court has no power to allow the applicant to practise.[63] When no appeal is provided for by statute, the medical or dental board, in passing on a question within its jurisdiction calling for the exercise of judgment, is supreme so long as it proceeds to a

53. State *v.* Chittenden, 127 Wis. 468, 107 N. W. 500.

54. Illinois State Bd. of Health *v.* People, 102 Ill. App. 614; Iowa Eclectic Medical College Assoc. *v.* Schrader, 87 Iowa 659, 55 N. W. 24, 20 L. R. A. 355; Smith *v.* State Bd. of Dental Examiners, 115 Ky. 212, 67 S. W. 999, 24 Ky. L. Rep. 25; Boucher *v.* State Bd. of Health, 19 R. I. 366, 33 Atl. 878.

55. See the statutes of the several states.

The term "unprofessional" does not contemplate matters of mere professional ethics, but is used convertibly with dishonorable. State *v.* State Medical Examining Bd., 32 Minn. 324, 20 N. W. 238, 50 Am. Rep. 575.

56. State *v.* State Medical Examining Bd., 32 Minn. 324, 20 N. W. 238, 50 Am. Rep. 575; Gage *v.* New Hampshire Eclectic Medical Soc., 63 N. H. 92, 56 Am. Rep. 492.

57. Injunction against medical examiners see Injunctions, 22 Cyc. 880 note 52.

58. See the statutes of the several states; and cases cited *infra*, this section.

In Idaho the state medical law contains no provision granting the right of appeal from the action of the board of examiners in refusing a license to an applicant, but by the terms of section 9 of the act [Laws (1899), p. 348] it is provided that the action of the board in refusing to grant a license under the provisions thereof may be reviewed by the district court on certiorari, provided proceedings therefor be instituted within ten days after notice of such refusal. Raaf *v.* State Bd. of Medical Examiners, 11 Ida. 707, 84 Pac. 33. By conferring this right, the legislature has indicated an intention to limit and confine the authority and jurisdiction of the courts in considering the action of the board to the procedure and scope of investigation and inquiry usually and ordinarily pursued and exercised by the courts in the issuance and consideration of writs of review. Raaf *v.* State Bd. of Medical Examiners, *supra*. **The language** of the medical act and the purposes and objects thereof preclude any inference that the legislature ever intended that a disappointed applicant might apply to the court and there have his answers reëxamined, marked, graded, and passed upon as to their correctness by the court. Raaf *v.* State Bd. of Medical Examiners, *supra*.

Effect of succession of new board before appeal.— The refusal to grant a license by a state board of medical examiners, which has been succeeded by a new and distinct board, and which refusal was not appealed from as permitted by law, cannot be reviewed on a subsequent appeal from a decision of the new board refusing a license to the same party. Miller *v.* Medical Bd., 33 Oreg. 5, 52 Pac. 763.

Refusal for incompetency.— When the right to appeal is granted in "all cases of the refusal or revocation of a certificate" by the medical board, the right exists as well where a certificate to practise medicine has been refused by the board for incompetency as where it has been refused for unprofessional, dishonorable, or immoral conduct. State *v.* First Judicial Dist. Ct., 19 Mont. 501, 48 Pac. 1104.

59. State *v.* First Judicial Dist. Ct., 19 Mont. 501, 48 Pac. 1104.

Judgment by consent.— A judgment on appeal to the circuit court, reversing a decision of the board of medical examiners, cannot be sustained where entered "by agreement" of an attorney acting for the prosecuting attorney without authority. *In re* Coffin, 152 Ind. 439, 53 N. E. 458.

60. State *v.* First Judicial Dist. Ct., 27 Mont. 103, 69 Pac. 710.

61. State *v.* First Judicial Dist. Ct., 27 Mont. 103, 69 Pac. 710.

62. State *v.* First Judicial Dist. Ct., 27 Mont. 103, 69 Pac. 710.

63. State *v.* First Judicial Dist. Ct., Dept. No. 2, 26 Mont. 121, 66 Pac. 754.

reasonable conclusion on evidence bearing on such question.[64] Mandamus will issue, however, to compel action by the board when they fail or refuse to act, and also in case of abuse of discretion.[65]

(IV) *REGISTRATION*—(A) *Necessity.* It is a common provision of medical laws that physicians must register their licenses or certificates with some designated county officer in order to be entitled to practise.[66] Such a requirement is mandatory upon all practitioners except such as may be expressly or impliedly exempted.[67] If a civil and a penal statute respecting registration are irreconcilable, as where they require registration with different officers, the penal provision is held inoperative.[68]

(B) *Time.* A statute requiring registration to take place within a certain time after the passage of the act must be strictly complied with, and registration after the prescribed period has elapsed is ineffectual to bring one within the protection of the statute.[69] The period of limitation has been held to begin to run from the time the law goes into effect, and not from the time of its approval.[70] An attempt to register under an act before it goes into effect is ineffectual.[71]

(C) *Place.* Under a statute requiring a practitioner to record his certificate in the county where he resides or sojourns, he must, upon changing his domicile to another county, furnish his certificate to the proper officer of the latter county for record.[72] But a statute requiring a physician to register in the county where he is practising or intends to commence the practice has been held not to require a physician who is duly registered and practising in one county to register in another county, so as to authorize him to visit patients in such other county.[73]

64. Van Vleck *v.* State Bd. of Dental Examiners, (Cal. 1897) 48 Pac. 223; Kowenstrot *v.* State, 6 Ohio S. & C. Pl. Dec. 467, 4 Ohio N. P. 257; State *v.* Chittenden, 127 Wis. 468, 107 N. W. 500.

65. See MANDAMUS, 26 Cyc. 242.

66. See the statutes of the several states.

Municipal regulation.— While in the exercise of its police power a regulation requiring all persons practising medicine or surgery in a city to register as such would probably be valid, a regulation making the right to register depend on the sanction or approval of an officer of the board of health, and of his view as to the qualifications of such persons to practise, and providing for the punishment of those violating such regulation, is unauthorized and void, the statutes of the state providing as to who shall and shall not practise. State *v.* Prendergast, 8 Ohio Cir. Ct. 401, 6 Ohio Cir. Dec. 807.

67. **Physicians registered under a former law** are generally exempted from registering again. State *v.* Morgan, 96 Mo. App. 343, 70 S. W. 267.

A statute incorporating a medical society, with such powers as pertain to other like corporations, does not exempt the members or licensees of that society from the operation of a statute requiring registration by physicians before practising for hire. State *v.* Bohemier, 96 Me. 257, 52 Atl. 643.

In Massachusetts, St. (1817) c. 131, § 3, requiring every person licensed to practise physic and surgery to deposit a copy of the license with the clerk of the town in which he may reside, does not apply to a person who has received the degree of doctor of medicine. Wright *v.* Lanckton, 19 Pick. 288.

In Nebraska a person practising medicine or surgery must file with the county clerk the sworn statement required by the act of March 3, 1881, section 2, notwithstanding he is a graduate of a medical college and has received a degree. Dogge *v.* State, 17 Nebr. 140, 22 N. W. 348.

68. French *v.* State, 14 Tex. App. 76.

69. Com. *v.* Densten, 217 Pa. St. 423, 66 Atl. 653; *In re* Wadel, 25 Pa. Co. Ct. 60. See also Battles *v.* Board of Registry, etc., 16 R. I. 372, 17 Atl. 131. *Compare* Ritter *v.* Rodgers, 8 Pa. Co. Ct. 451, holding that Pa. Act, April 11, 1889, § 2 (Pamphl. Laws 28), providing that veterinary surgeons of five years' standing, who are not entitled to use the degree of veterinary surgeon, shall register within six months after passage of the act, or be guilty of a misdemeanor in using the title thereafter, is unconstitutional.

70. Patrick *v.* Perryman, 52 Ill. App. 514.

71. State *v.* McIntosh, 205 Mo. 616, 103 S. W. 1071.

72. Hilliard *v.* State, 7 Tex. App. 69.

73. Martino *v.* Kirk, 55 Hun (N. Y.) 474, 8 N. Y. Suppl. 758.

In Kentucky a late statute declares that all persons hereafter receiving a certificate of qualification to practise dentistry shall have it recorded in the county or counties in which they shall practise. Such statute applies only to persons receiving certificates after its enactment. Com. *v.* Nevill, 92 S. W. 550, 29 Ky. L. Rep. 108, holding that a dentist who had previously received his certificate and had it registered under a former statute in the county of his residence was not bound to have it registered again in the county or counties in which he should practise.

In Pennsylvania under the former statute

(D) *Curing Invalid Registration.* One whose registration is not legal because of error, misunderstanding, or unintentional omission may, by a subsequent valid registration, validate the original registration from the date of its filing, and thus be relieved of the consequences attendant upon a failure to register or an imperfect registration.[74] A medical register is a public record, over which the court in charge of whose office it is put has summary power of correction or cancellation on its own motion or the suggestion of any one.[75]

(V) *Revocation*—(A) *Authority to Revoke.* The state, in the exercise of its police power, may prescribe the qualifications of persons desiring to practise medicine, and may create a board whose duty it shall be to hear and determine any complaint made against any person holding a physician's license or certificate and revoke such license or certificate for any cause provided for in the statute.[76] The power to revoke such licenses or certificates is not a judicial power, which cannot, under the state constitution, be vested in the board of examiners.[77] Whether such a statute authorizes the revocation of a certificate issued prior to its passage depends entirely upon the wording of the statute.[78] The fact that a license is issued to one not entitled to it will not prevent the board from revoking it.[79]

(B) *Acts Authorizing Revocation.* The grounds commonly designated by the statute upon which the medical board is authorized to revoke a physician's license or certificate are unprofessional, dishonorable, or immoral conduct.[80] Unprofessional or dishonorable conduct is not defined by the common law, and what conduct may be of either kind is a matter of opinion only.[81] For this reason it

a physician duly registered in one county, but who went at regular intervals into another, and had a place of business there to meet all patients who might call on him, was a sojourner and liable to a penalty for neglect to register in the latter county. Ege *v.* Com., 6 Pa. Cas. 583, 9 Atl. 471. By a later statute, however, one registry is made sufficient warrant to practise in any county of the state. Fishblate *v.* McCullough, 9 Pa. Super. Ct. 147; Com. *v.* Townley, 7 Pa. Dist. 413.

74. Parish *v.* Foss, 75 Ga. 439 (failure to register through neglect of clerk to have proper book); Ottaway *v.* Lowden, 172 N. Y. 129, 64 N. E. 812 [*reversing* 55 N. Y. App. Div. 410, 66 N. Y. Suppl. 952]; New York *v.* Bigelow, 13 Misc. (N. Y.) 42, 34 N. Y. Suppl. 92 (registration with wrong officer); Pettit *v.* State, 28 Tex. App. 240, 14 S. W. 127.

75. *In re* Campbell, 197 Pa. St. 581, 47 Atl. 860.

76. *California.*— Hewitt *v.* State Bd. of Medical Examiners, 148 Cal. 590, 84 Pac. 39, 113 Am. St. Rep. 315, 3 L. R. A. N. S. 896.

District of Columbia.— Czarra *v.* District of Columbia Bd. of Medical Sup'rs, 25 App. Cas. 443.

Illinois.— Williams *v.* People, 17 Ill. App. 274, power to revoke certificates of those only who are not graduates in medicine.

Kansas.— Meffert *v.* State Bd. of Medical Registration, etc., 66 Kan. 710, 72 Pac. 247, 1 L. R. A. N. S. 811 [*affirmed* in 195 U. S. 625, 25 S. Ct. 790, 49 L. ed. 350].

New York.— *In re* Smith, 10 Wend. 449.

See 39 Cent. Dig. tit. "Physicians and Surgeons," § 15.

77. State *v.* State Bd. of Medical Examiners, 34 Minn. 387, 26 N. W. 123; State Bd. of Health *v.* Roy, 22 R. I. 538, 48 Atl. 802.

78. See cases cited *infra*, this note.

"License heretofore issued."— Wis. Laws (1905), p. 726, c. 422, giving the circuit court power to revoke a license to practise medicine "which has been heretofore or which may be hereafter issued" to any person guilty of immoral conduct after the passage of this act, or who has procured such license by fraud or perjury, is retroactive so as to permit a revocation of the license of a physician practising after the passage of the act under a license obtained by fraud prior thereto. State *v.* Schaeffer, 129 Wis. 459, 109 N. W. 522.

License issued "under this act."—A statute giving a state medical board power to revoke licenses issued "under" or "in compliance with" such act has no application to licenses granted under a former act. State Bd. of Health *v.* Ross, 191 Ill. 87, 60 N. E. 811 [*affirming* 91 Ill. App. 281]; State *v.* Webster, 150 Ind. 607, 50 N. E. 750, 41 L. R. A. 212.

79. State *v.* Goodier, 195 Mo. 551, 93 S. W. 928.

80. See the statutes of the several states.

The statutes of Ontario provide that the name of any practitioner who has been guilty of disgraceful conduct in a professional respect shall be liable to have his name erased from the medical register. See *In re* Washington, 23 Ont. 299.

81. Czarra *v.* Board of Medical Sup'rs, 25 App. Cas. (D. C.) 443.

The word "unprofessional" has been judicially defined as synonymous with "dishonorable." State *v.* State Medical Examining

has been held in several cases that such a statute is void for uncertainty.[82] Similar statutes have been construed in other jurisdictions without the question of validity being raised, the courts merely considering what can be deemed unprofessional, dishonorable, or immoral conduct. Thus it has been held ground for revoking a license to obtain from the medical board, by misrepresentation, a certificate to practise medicine;[83] or to misrepresent to a patient the character of his disease, and obtain money from him upon the strength of such misrepresentation;[84] or to perform a pretended operation upon a woman to enable her to conceal her real condition from her parents.[85] It is held not to be immoral, dishonorable, or unprofessional for a physician to conceal the fact that one of his patients had innocently suffered the accident of a miscarriage.[86] Mere advertising by a physician is not such unprofessional conduct as to warrant the revocation of his license;[87] if, however, the advertisement is false and known to be false, and is a studied effort to impose upon the credulity of the public for gain, the law is otherwise.[88] A statute providing that a license to practise medicine may be

Bd., 32 Minn. 324, 20 N. W. 238, 50 Am. Rep. 575. If it is shown that a medical man in the pursuit of his profession has done something in regard to it which would be reasonably regarded as disgraceful and dishonorable by his professional brethren of good repute and competency, it is open to the board to find that he has been "guilty of infamous conduct in a professional respect." Allinson *v.* General Council of Medical Education, etc., [1894] 1 Q. B. 750, 58 J. P. 542, 63 L. J. Q. B. 534, 70 L. T. Rep. N. S. 471, 9 Reports 217, 42 Wkly. Rep. 289.

82. Hewitt *v.* State Bd. of Medical Examiners, 148 Cal. 590, 84 Pac. 39, 113 Am. St. Rep. 315, 3 L. R. A. N. S. 896 (holding that the provision of a statute which authorizes the revocation of the certificate of a physician by the board of medical examiners for unprofessional conduct, consisting of medical advertising in which grossly improbable statements are made, but which fails to define "grossly improbable statements" in any way, but leaves their definition in each particular case to the opinion of the then board of medical examiners, is too indefinite and uncertain to be capable of enforcement); Czarra *v.* Board of Medical Sup'rs, 25 App. Cas. (D. C.) 443; Matthews *v.* Murphy, 63 S. W. 785, 23 Ky. L. Rep. 750, 54 L. R. A. 415.

These decisions proceed upon the principle that legislation providing for the revocation of the certificate of a physician for professional or moral unfitness must be reasonable in its provisions, and must apply to matters or conduct on the part of the physician which affect the health, morals, or safety of the community, and the **acts or conduct** which are made ground of forfeiture must be declared with certainty and definiteness. Hewitt *v.* State Bd. of Medical Examiners, 148 Cal. 590, 84 Pac. 39, 113 Am. St. Rep. 315, 3 L. R. A. N. S. 896.

Test of uncertainty.— The courts cannot uphold and enforce a statute whose broad and indefinite language may apply not only to a particular act about which there would be little or no difference of opinion, but equally to others about which there might be radical differences, thereby devolving upon the tribunals charged with the enforcement of the law the exercise of an arbitrary power of discriminating between the several classes of acts. Czarra *v.* Board of Medical Sup'rs, 25 App. Cas. (D. C.) 443.

In the District of Columbia the act of congress of June 3, 1896, chapter 313, section 10, provides that sufficient cause exists for the revocation of a physician's license in the employment of fraud or deception in passing the examinations required, in chronic inebriety, the practice of criminal abortion, or in case of conviction of crime involving moral turpitude. Czarra *v.* Board of Medical Sup'rs, 25 App. Cas. (D. C.) 443, holding that the conviction of a physician of distributing obscene and indecent printed matter in his district is a sufficient ground for the revocation of his license.

83. State Bd. of Health *v.* Roy, 22 R. I. 538, 48 Atl. 802.

84. *Re* Washington, 23 Ont. 299.

85. *In re* Telford, 11 Brit. Col. 355.

86. State *v.* Kellogg, 14 Mont. 426, 36 Pac. 957.

87. *Re* Washington, 23 Ont. 299.

Publishing broadcast the symptoms of catarrh is not conduct disgraceful in a professional respect. *In re* Washington, 23 Ont. 209.

88. People *v.* McCoy, 125 Ill. 289, 17 N. E. 786; People *v.* McCoy, 30 Ill. App. 272 (both of which cases hold, however, that a charge that the holder of a certificate made statements and promises as to the cure of the sick calculated to deceive and defraud the public, although sufficient to authorize a revocation, is not sustained by evidence of an advertisement headed "A Surgical Triumph," and reciting that the holder had opened an office for a limited time, nor by other advertisements reciting his wonderful attainments and success); State *v.* State Bd. of Medical Examiners, 34 Minn. 391, 26 N. W. 125; *In re* Washington, 23 Ont. 299.

Similarly it has been held that one publishing advertisements reflecting upon the medical profession generally in order to induce people to come to him for advice is "guilty of infamous conduct in a professional respect," warranting the revocation of his

revoked only for unprofessional or dishonorable conduct has no application to a temporary license issued by the board of medical examiners without authority.[89]

(c) *Proceedings to Revoke*—(1) In General. The action of a medical board in revoking a physician's license or certificate for unprofessional or dishonorable conduct being in its nature judicial, the board has no power to institute such a proceeding without a reasonable notice of the charge against him, and the time and place of the trial thereof.[90] But a board, in conducting such an investigation, is not a judicial tribunal, and is not governed by the technical rules applicable to law courts.[91]

(2) Parties. Where a proceeding to cancel a certificate issued to a physician without authority can be brought only by the attorney-general, it has been held that the board of examiners is a necessary party defendant to the proceedings because it is the official action of the board which is attacked.[92] In a proceeding by a board of medical examiners, on relation of other parties, to revoke the license of a physician for unprofessional conduct, the state is properly made a party thereto.[93]

(3) Complaint. Certainty to a common intent is all that is required in the complaint for revocation.[94]

(4) Evidence. The practice in revocation proceedings before a medical board being more flexible than that allowable in the courts, evidence which tends to prove or disprove the point in issue may be introduced, although not the best evidence which might be had.[95]

(5) Appeal. Where no appeal is provided for, in the absence of fraud, corruption, or oppression, the findings of a medical board in a proceeding to

license. Allinson *v.* General Council of Medical Education, etc., [1804] 1 Q. B. 750, 58 J. P. 542, 63 L. J. Q. B. 534, 70 L. T. Rep. N. S. 471, 9 Reports 217, 42 Wkly. Rep. 289.

89. Volp *v.* Saylor, 42 Oreg. 546, 71 Pac. 980.

90. People *v.* McCoy, 125 Ill. 289, 17 N. E. 786 (holding that where defendant testified that notice of the proceedings to revoke was never served on him, plaintiff's affidavit of service of notice is insufficient to overcome such testimony, and the proceedings must be taken to be invalid); State *v.* State Medical Examining Bd., 32 Minn. 324, 20 N. W. 238, 50 Am. Rep. 575; State *v.* Schultz, 11 Mont. 429, 28 Pac. 643; Reg. *v.* Ontario College of Physicians, etc., 44 U. C. Q. B. 146.

The mere fact that the statute is silent respecting the procedure will not warrant the construction that the investigation should be made *ex parte*, or without reasonable opportunity to be heard. State *v.* State Medical Examining Bd., 32 Minn. 324, 20 N. W. 238, 50 Am. Rep. 575; State *v.* Schultz, 11 Mont. 429, 28 Pac. 643.

An exception to the rule requiring notice and an opportunity to be heard exists in the case of a license, void because issued without authority to one not entitled thereto. Volp *v.* Saylor, 42 Oreg. 546, 71 Pac. 980.

91. Meffert *v.* State Bd. of Medical Registration, etc., 66 Kan. 710, 72 Pac. 247, 1 L. R. A. N. S. 811 [*affirmed* in 195 U. S. 625, 25 S. Ct. 790, 49 L. ed. 350].

92. Brown *v.* Grenier, 73 N. H. 426, 62 Atl. 590. But see State *v.* Schaeffer, 129 Wis. 459, 109 N. W. 522, holding that the state board of medical examiners is not a necessary party to a proceeding by the state to revoke a license to practise medicine, procured from such board by fraud of the applicant.

93. State *v.* Estes, 34 Oreg. 196, 51 Pac. 77, 52 Pac. 571, 55 Pac. 25.

94. Walker *v.* McMahn, 75 Nebr. 179, 106 N. W. 427; Munk *v.* Frink, 75 Nebr. 172, 106 N. W. 425, holding that a complaint filed before a state medical board for the purpose of procuring an order revoking the license of a physician is sufficient, if it informs the accused, not only of the nature of the wrong laid to his charge, but also of the particular incidents of its alleged perpetration.

95. Traer *v.* State Bd. of Medical Examiners, 106 Iowa 559, 76 N. W. 833.

Proof by affidavits is not error, where the accused, after notice, fails to appear and object. Traer *v.* State Bd. of Medical Examiners, 106 Iowa 559, 76 N. W. 833, holding further that under a statute making a certified transcript of equal credit with an original, a certified transcript of a coroner's return containing the written evidence and the names of witnesses before an inquisition, although such evidence was adduced by means of affidavits, is proper evidence before the state board of medical examiners in a proceeding to revoke a certificate to practise medicine, where it was not objected to.

A statutory provision that the president or any member of the state board of medical examiners may administer oaths and take testimony on matters relative to their duties does not provide an exclusive mode of proof so as to prevent the consideration by the board of evidence not so taken. Traer *v.* State Bd. of Medical Examiners, 106 Iowa 559, 76 N. W. 833.

revoke a physician's license are conclusive on the courts.[96] But an appeal or writ of review in such case is sometimes provided for to the district or circuit court in and for the county in which the hearing was had;[97] and the right is not nugatory, because the legislature has prescribed no rules of practice to guide the district court in adjudicating such cases.[98]

(6) EFFECT OF FORMER ADJUDICATION. A medical board is not precluded from preferring charges against a physician to revoke his license by the fact that the same charges had been once before passed upon by them, and had not been sustained.[99] Nor are the trial and acquittal of a physician in a court of criminal jurisdiction on the same charges exhibited against him by a medical society a bar to an inquiry under the statute for the purpose of depriving him of the right to practise.[1]

(VI) *WHO MAY BE LICENSED.* While a corporation is a person in a certain sense, it is not such a person as can be licensed to practise medicine.[2] But licensed physicians may form a corporation, and make contracts for the services of its members and other licensed physicians without thereby violating a statute forbidding the practice of medicine without a license.[3]

b. Temporary License. A statutory provision authorizing a single member of the state medical board to grant a temporary license to an applicant to practise medicine until the next meeting of the board has been construed to authorize the granting of a temporary license to an applicant from year to year, provided the

96. Meffert *v.* State Bd. of Medical Registration, etc., 66 Kan. 710, 72 Pac. 247, 1 L. R. A. N. S. 811 [*affirmed* in 195 U. S. 625, 25 S. Ct. 790, 49 L. ed. 350].

Certiorari will not lie to review rulings on the competency and sufficiency of evidence not objected to. Traer *v.* State Bd. of Medical Examiners, 106 Iowa 559, 76 N. W. 833.

97. See the statutes of the several states. And see Walker *v.* McMahn, 75 Nebr. 179, 106 N. W. 427; Munk *v.* Frink, 75 Nebr. 172, 106 N. W. 425; State *v.* Estes, 34 Oreg. 196, 51 Pac. 77, 52 Pac. 571, 55 Pac. 25, holding that an appeal will not be dismissed because the record is silent as to where the hearing was had, where the motion to dismiss recites that the hearing was had in the county in which the circuit court to which the appeal was taken was located, and the decision of the board purports to have been signed in that county.

Under a statute further providing that either party may appeal from the judgment of the circuit court to the supreme court in the same manner as in civil actions, the medical board has authority to appeal from the judgment of the circuit court overruling its findings. State *v.* Estes, 34 Oreg. 196, 51 Pac. 77, 52 Pac. 571, 55 Pac. 25.

98. State *v.* First Judicial Dist. Ct., 13 Mont. 370, 34 Pac. 298.

Papers filed in such an appeal as an answer of the board and signed by their attorney are nugatory where no provision for the filing of such papers is made by the statute. State Bd. of Health *v.* Roy, 22 R. I. 538, 48 Atl. 802.

A notice of appeal from the circuit court, signed by the attorneys, in behalf of the board of medical examiners, which signature was authorized by the president of the board, and afterward ratified by said board, is sufficient, so far as the attorneys' authority is concerned, to give the supreme court jurisdiction. State *v.* Estes, 34 Oreg. 196, 51 Pac. 77, 52 Pac. 571, 55 Pac. 25.

Costs.— Where a statute providing for appeals from a medical examining board makes no provision for recovery of costs in case the action of the board is reversed, defendant is not entitled to recover costs from the relators as in an ordinary action, the general statute providing for the recovery of costs not being applicable to appeals in this class of cases. State *v.* Estes, 34 Oreg. 196, 51 Pac. 77, 52 Pac. 571, 55 Pac. 25.

99. Czarra *v.* District of Columbia Medical Sup'rs, 25 App. Cas. (D. C.) 443; *In re* Smith, 10 Wend. (N. Y.) 449.

1. *In re* Smith, 10 Wend. (N. Y.) 449, where it is said that the two proceedings are entirely distinct and independent, having different objects in view; the one having regard to the general welfare and criminal justice of the state; the other simply and exclusively to the respectability and character of the medical profession, and the consequences connected with or necessarily flowing from it.

2. State Electro-Medical Inst. *v.* State, 74 Nebr. 40, 103 N. W. 1078, Sedgwick, J., delivering the opinion of the court, and Barnes, J., dissenting.

The qualifications of a medical practitioner are personal to himself, and the intent of a statute in compelling a license to practise medicine is that one who undertakes to judge the nature of disease and to determine the remedy therefor must have the personal qualifications prescribed by statute. State Electro-Medical Inst. *v.* State, 74 Nebr. 40, 103 N. W. 1078.

3. State Electro-Medical Inst. *v.* State, 74 Nebr. 40, 103 N. W. 1078; State Electro-Medical Inst. *v.* Platner, 74 Nebr. 23, 103 N. W. 1079.

full board in the meantime has not refused to license the applicant;[4] but after the board, as such, has refused a license to an applicant, no one member can grant him one.[5] The fact that the board of medical examiners, in issuing a temporary license, used the form of a regular license, which erroneously recited that plaintiff had passed a satisfactory examination in medicine and surgery before the board, and was thereby authorized to practise, and merely limited the duration of the license, does not constitute such license a regular unlimited license to practise.[6]

c. Renewal License. All physicians or dentists licensed by the board or any previous board are entitled to a renewal license each year on application.[7]

d. License From Another State. Under the Colorado statute a license from the board of dental examiners of that state is not necessary to entitle a person to practise dentistry, if such person has a valid and sufficient license from the board of any other state.[8]

3. Proof of Diploma. An applicant for a license or certificate to practise medicine who possesses a diploma must furnish to the medical board satisfactory proof of having received it from a legally chartered medical institution in good standing.[9] A diploma is not *per se* evidence of that fact;[10] the existence of the college at the date of the diploma must be proved by producing its act of incorporation.[11]

4. Good Moral Character. The legislature has the same power to require, as a condition of the right to practise the profession, that the applicant shall be possessed of the qualifications of honor and a good moral character, as it has to require that he shall be learned in the profession.[12]

5. Privilege or Occupation Taxes.[13] Unless specially restrained by the constitution, the legislature may confer upon municipal corporations the right to tax physicians practising medicine therein.[14] So itinerant physicians are frequently required to pay an occupation tax.[15]

4. Wragg *v.* Strickland, 36 Ga. 559.

5. Wragg *v.* Strickland, 36 Ga. 559; Peterson *v.* Seagraves, 94 Tex. 390, 60 S. W. 751.

6. Volp *v.* Saylor, 42 Oreg. 546, 71 Pac. 980, holding further that the fact that the board of medical examiners is without power to grant a temporary license to an unsuccessful candidate does not justify one to whom such a license has been granted in altering the same so as to make it appear to be a regular unlimited license.

7. State *v.* McIntosh, 205 Mo. 616, 103 S. W. 1071.

Where, however, the board is given authority to inquire whether the former license was rightfully obtained, and to refuse or revoke a license for criminal conduct or immoral character, the old license is merely *prima facie* evidence of a right to the new one. State *v.* Webster, 150 Ind. 607, 50 N. E. 750, 41 L. R. A. 212.

8. Robinson *v.* People, 23 Colo. 123, 46 Pac. 676.

9. State *v.* Gregory, 83 Mo. 123, 53 Am. Rep. 565.

In Pennsylvania, under the act of June 8, 1881, requiring a medical practitioner having a diploma from an institution in another state to obtain the indorsement thereon of the dean of some medical faculty within the state, the filing of a certificate made by the secretary of a medical faculty is not sufficient, even if the institution applied to refuses to indorse any diploma. *In re* Bauer, 2 Pa. Cas. 69, 4 Atl. 913.

10. Hill *v.* Boddie, 2 Stew. & P. (Ala.) 56.

11. Hunter *v.* Blount, 27 Ga. 76.

12. State *v.* State Medical Examining Bd., 32 Minn. 324, 20 N. W. 238, 50 Am. Rep. 575; Wert *v.* Clutter, 37 Ohio St. 347; Com. *v.* Irving, 1 Susq. Leg. Chron. (Pa.) 69.

13. License or occupation tax generally see LICENSES, 25 Cyc. 593 *et seq.* See also CONSTITUTIONAL LAW, 8 Cyc. 900 note 83; 1046 note 91.

14. Savannah *v.* Charlton, 36 Ga. 460 (holding, however, that a physician lawfully licensed to practise medicine anywhere in the state cannot be compelled to take out a license before practising in any particular city); Girard *v.* Bissell, 45 Kan. 66, 25 Pac. 232.

15. See the statutes of the several states. "Itinerant physician" defined see *supra*, p. 1545 note 3.

Dental surgeon.— Under Iowa Code, § 700, giving cities and towns power to license and tax "itinerant doctors, itinerant physicians and surgeons," a city had no power to require a "dental surgeon" to obtain a license. Cherokee *v.* Perkins, 118 Iowa 405, 92 N. W. 68.

In Pennsylvania, the act of March 24, 1877, which requires all itinerant medical practitioners to obtain an annual license, is not repealed by the act of June 8, 1881, which requires all physicians and surgeons to

6. Exemptions From Operation of Statutes — a. In General. The statutes in many states except from their operation certain classes of persons, and services rendered in particular cases. Thus it is commonly provided that the statute shall not apply to any commissioned medical officer of the United States army, navy, or marine service; medical examiners of relief departments of railroad companies; members of the staff of hospitals and asylums; physicians called into consultation from another state, or to treat a particular case, and who do not otherwise practise in the state;[16] medical students assisting at operations under the supervision of a licensed physician;[17] or to services rendered gratuitously, or in case of emergency,[18] or to the administration of domestic medicines.[19] These exemptions have been attacked as unconstitutional on the ground of discrimination, but have been upheld by the courts.[20]

b. Prior Practitioners. One who has an established practice as a physician or dentist is not *ipso facto* exempt from complying with subsequent legislation requiring him to conform to a reasonable standard respecting qualification.[21] Medical laws quite frequently, however, exempt from their operation those who have practised in the state for a prescribed time previous to the passage thereof,[22] and such a provision is not unconstitutional on the ground of discrimination.[23] This exemption applies only to those whose previous practice was lawful.[24]

register their diplomas. Moore *v.* Bradford County, 148 Pa. St. 342, 23 Atl. 896. But see Peebles *v.* Wayne County, 10 Pa. Co. Ct. 69.

16. State *v.* Bohemier, 96 Me. 257, 52 Atl. 643; Com. *v.* Wilson, 6 Pa. Dist. 628, 19 Pa. Co. Ct. 521.

17. State Bd. of Registration, etc. *v.* Terry, 73 N. J. L. 156, 62 Atl. 193, holding that to exempt defendant from the penalties of the act for practising dentistry without a license, it was not sufficient that he was a student, but his practice must have consisted in assisting his preceptor under his direct and personal supervision.

18. People *v.* Lee Wah, 71 Cal. 80, 11 Pac. 851, holding that where one without a certificate renders gratuitous medical services to a person, because his case has been given up by regular practitioners, this is not an "emergency."

An emergency means a case in which ordinary medical practitioners are not available, as where the exigency is of so pressing a character that some kind of action must be taken before such parties can be found or procured. People *v.* Lee Wah, 71 Cal. 80, 11 Pac. 851.

19. State *v.* Huff, 75 Kan. 585, 90 Pac. 279, 12 L. R. A. N. S. 1094, holding, however, that where defendant is charged with recommending a medicine for a fee, the fact that it was a domestic medicine does not constitute a defense.

20. State *v.* Bohemier, 96 Me. 257, 52 Atl. 643; Com. *v.* Wilson, 6 Pa. Dist. 628, 19 Pa. Co. Ct. 521.

21. Allopathic State Bd. of Medical Examiners *v.* Fowler, 50 La. Ann. 1358, 24 So. 809; People *v.* Fulda, 52 Hun (N. Y.) 65, 4 N. Y. Suppl. 945, 7 N. Y. Cr. 1; State *v.* Gravett, 65 Ohio St. 289, 62 N. E. 325, 87 Am. St. Rep. 605, 55 L. R. A. 791.

22. *Alabama.*— Harrison *v.* State, 102 Ala. 170, 15 So. 563.

Idaho.— State *v.* Cooper, 11 Ida. 219, 81 Pac. 374.

Ohio.— State *v.* Ohio State Medical Bd., 60 Ohio St. 21, 53 N. E. 298.

Pennsylvania.— Com. *v.* Gibson, 7 Pa. Dist. 386.

Texas.— Ranald *v.* State, (Cr. App. 1898) 47 S. W. 976 (evidence insufficient to show previous practice); Hilliard *v.* State, 7 Tex. App. 69.

In Rhode Island the physician must have been "reputably and honorably" engaged in the practice of medicine prior to the passage of the act. Paquin *v.* State Bd. of Health, 19 R. I. 365, 33 Atl. 870.

Under a statute providing that previous practice constitutes a prima facie qualification, the medical board may refuse a certificate on the ground of incompetency despite the fact of prior practice for the statutory time. State *v.* Mosher, 78 Iowa 321, 43 N. W. 202.

Proof of previous practice.— Where the excepted class of applicants are required to furnish the board satisfactory evidence of their previous practice and procure a certificate, one cannot avail himself of the exemption unless such requirement has been complied with. State *v.* Mosher, 78 Iowa 321, 43 N. W. 202. See also State *v.* Hicks, 143 N. C. 689, 57 S. E. 441.

23. State *v.* Creditor, 44 Kan. 565, 24 Pac. 346, 21 Am. St. Rep. 306; *Ex p.* Spinney, 10 Nev. 323; State *v.* Call, 121 N. C. 643, 28 S. E. 517.

24. State *v.* Board of Dental Examiners, etc., 26 Ohio Cir. Ct. 369; State *v.* Board of Dental Examiners, 31 Wash. 492, 72 Pac. 110.

For that reason the fact that one practised medicine for more than the prescribed period after the passage of the act is no defense to a prosecution for practising without authority, since the continued violation of the statute cannot result in such authority without

Furthermore it has been held that the applicant must have been in the practice at the time of the passage of the act.[25]

C. Practising Without Authority — 1. What Constitutes — a. Practising Medicine or Surgery — (I) *In General* — (A) *In Absence of Definition of Term.* In the absence of a statutory definition of what acts shall constitute the practice of medicine and surgery, the words "medicine and surgery" and "practice of medicine and surgery" are usually taken to have a meaning in their ordinary sense.[26] Medicine, in the popular sense, is a remedial substance;[27] something which is administered, either internally or externally, in the treatment of disease or the relief of sickness.[28] The practice of medicine, as ordinarily or popularly understood, has relation to the art of preventing, curing, or alleviating disease or pain.[29] Nor is it necessary for one to profess to practise generally either as a physician or surgeon to bring him within the operation of the statute, but it extends to any one engaging in practice in a distinct department of either profession.[30]

(B) *When Term Defined by Statute.* The state has the right to determine what acts shall constitute the practice of the healing art,[31] and this right has been frequently exercised with a tendency to extend rather than restrict the meaning of the term. What then constitutes the practice of medicine depends upon the language of the particular statute.[32]

(II) *Christian Science Treatment.* Under a statute making it unlawful to practise medicine without a license, but not attempting to define what constitutes "practising medicine," it is held that the term must be construed to relate to the practice of medicine as ordinarily and popularly understood, and therefore does not include one who gives treatment by the system known as "christian science."[33] Where, however, the meaning of the term "practising medicine"

compliance with its requirements. State *v.* Wilson, 61 Kan. 791, 60 Pac. 1054; Hargan *v.* Purdy, 93 Ky. 424, 20 S. W. 432, 14 Ky. L. Rep. 383; Driscoll *v.* Com., 93 Ky. 393, 20 S. W. 431, 703, 14 Ky. L. Rep. 376. *Contra*, Wert *v.* Clutter, 37 Ohio St. 347, holding that ten years of continuous practice might embrace time since as well as before the taking effect of the act.

25. Sherburne *v.* Board of Dental Examiners, 13 Ida. 105, 88 Pac. 762; Hart *v.* Folsom, 70 N. H. 213, 47 Atl. 603, holding that evidence that plaintiff had practised medicine prior to the passage of the act was not sufficient to entitle him to a certificate, since the applicant must have been in the practice at the time of the passage of the act to come within the provision of the statute.

The words "at the time of the passage of the act" refer to the date when the act takes effect and not when it is approved. Mills *v.* State Bd. of Osteopathic Registration, etc., 135 Mich. 525, 98 N. W. 19.

26. Kansas City *v.* Baird, 92 Mo. App. 204; State *v.* Heffernan, 28 R. I. 20, 65 Atl. 284.

27. State *v.* Mylod, 20 R. I. 632, 40 Atl. 753, 41 L. R. A. 428.

28. Kansas City *v.* Baird, 92 Mo. App. 204.

"Medicine" defined see 27 Cyc. 466.

29. State *v.* Mylod, 20 R. I. 632, 40 Atl. 753, 41 L. R. A. 428.

"Practice of medicine" see 27 Cyc. 466 note 19.

Clairvoyance.— The services of a medical clairvoyant have been held to be medical services. Bibber *v.* Simpson, 59 Me. 181.

Electrical treatment.— It is not necessary that internal remedies be administered; they may be applied externally, and they need not necessarily be substances which may be seen and handled. Thus one giving electrical treatment is "practising medicine." Davidson *v.* Bohlman, 37 Mo. App. 576.

30. Hewitt *v.* Charier, 16 Pick. (Mass.) 353, holding that one who professes and practises bone-setting in dislocations and fractures, reducing sprains, swellings, and contractions of the sinews by friction and fomentation, is practising surgery.

31. State *v.* Edmunds, 127 Iowa 333, 101 N. W. 431; State *v.* Yegge, 19 S. D. 234, 103 N. W. 17, 69 L. R. A. 504.

32. See the statutes of the several states.

33. Kansas City *v.* Baird, 92 Mo. App. 204; Evans *v.* State, 9 Ohio S. & C. Pl. Dec. 222, 6 Ohio N. P. 129; State *v.* Mylod, 20 R. I. 632, 40 Atl. 753, 41 L. R. A. 428. See also Reg. *v.* Stewart, 17 Ont. 4.

"Other agency" does not include christian science.— Under a statute prohibiting any person not having a certificate from the board of medical registration from prescribing, directing, or recommending any drug, medicine, or other agency for the treatment, cure, or relief of any bodily infirmity, the term "other agency" does not include the system known as "christian science." Evans *v.* State, 9 Ohio S. & C. Pl. Dec. 222, 6 Ohio N. P. 129.

In Maine a "christian scientist" may

has been extended by statute to cover all treatment of whatever nature for the cure of physical or mental ailments, then giving christian science treatment without a license is in violation of the law.[34]

(III) *OSTEOPATHY.* Whether or not a person giving osteopathic treatment is to be regarded as "practising medicine" depends either upon the construction placed upon that term by the courts, or upon the comprehensiveness of the definition given by the statute itself.[35] But it has been several times held that an osteopath is not within a statute forbidding the prescribing or applying of any drug, medicine, appliance, or other agency by an unlicensed person.[36] Nor does osteopathy come within an exception in a statute applying to persons treating the sick by mental or spiritual means.[37]

(IV) *PROFESSING TO CURE OR HEAL*—(A) *In General.* In many states it is provided that any person shall be held as practising medicine within the meaning of a statute prohibiting the practice of medicine without a license, who shall publicly profess to cure or heal, or hold himself out as a physician, and assume the duties,[38] or who shall prefix the title "doctor" or "professor" or append the letters "M. D." to his name.[39] A mere public profession of an ability to heal will

practise the healing art according to that method, on obtaining a certificate of good moral character pursuant to Rev. St. c. 13, § 9. Wheeler *v.* Sawyer, (1888) 15 Atl. 67.

34. State *v.* Buswell, 40 Nebr. 158, 58 N. W. 728, 24 L. R. A. 68; State *v.* Marble, 72 Ohio St. 21, 73 N. E. 1062, 106 Am. St. Rep. 570, 70 L. R. A. 835.

The Illinois statute expressly exempts from its operation those who treat the sick by mental or spiritual means without the use of drugs or material remedy. Hurd Rev. St. p. 1144 [Laws (1889), p. 275, § 7].

35. Thus where the statute merely regulates the "practice of medicine" some courts confining the definition of the words "practise medicine" to the mere administration of drugs, or use of surgical instruments, hold that an osteopathist is not within the statute. State *v.* Lawson, (Del. 1907) 65 Atl. 593; Nelson *v.* State Bd. of Health, 108 Ky. 769, 57 S. W. 501, 22 Ky. L. Rep. 438, 50 L. R. A. 383; Smith *v.* Lane, 24 Hun (N. Y.) 632; State *v.* Biggs, 133 N. C. 729, 46 S. E. 401, 98 Am. St. Rep. 731, 64 L. R. A. 139; State *v.* McKnight, 131 N. C. 717, 42 S. E. 580, 59 L. R. A. 187; Com. *v.* Pierce, 10 Pa. Dist. 335; Com. *v.* Thompson, 24 Pa. Co. Ct. 667, 7 Lack. Leg. N. 111. Other courts hold that the legislative intent was to include all who practise the healing art, whatever the treatment employed, and therefore the practice of osteopathy is within the statute. Ligon *v.* State, 145 Ala. 659, 39 So. 662; Bragg *v.* State, 134 Ala. 165, 32 So. 767, 58 L. R. A. 925; People *v.* Allcutt, 117 N. Y. App. Div. 546, 102 N. Y. Suppl. 678 [*affirmed* in 189 N. Y. 517, 81 N. E. 1171]. Under a statute providing that any one shall be regarded as practising medicine who shall treat, operate on, or prescribe for any physical ailment of another, one engaged in the practice of osteopathy is practising medicine. People *v.* Gordon, 194 Ill. 560, 62 N. E. 858, 88 Am. St. Rep. 165 [*reversing* 96 Ill. App. 456]; People *v.* Jones, 92 Ill. App. 445; Jones *v.* People, 84 Ill. App. 453; Eastman *v.* People, 71 Ill. App. 236; Little *v.* State, 60 Nebr. 749, 84 N. W. 248, 51 L. R. A. 717; State *v.* Gravett, 65 Ohio St. 289, 62 N. E. 325, 87 Am. St. Rep. 605, 55 L. R. A. 791.

36. Hayden *v.* State, 81 Miss. 291, 33 So. 653, 95 Am. St. Rep. 471, 63 L. R. A. 616; State *v.* Herring, 70 N. J. L. 34, 56 Atl. 670 [*affirmed* in (1905) 60 Atl. 1134].

"Osteopathy" is not an "agency" within the act of Feb. 27, 1896, "to regulate the practice of medicine" (92 Ohio Laws 44), which forbids the prescribing of any "drug or medicine or other agency" for the treatment of disease by a person who has not obtained from the board of medical registration and examination a certificate of qualification. State *v.* Liffring, 61 Ohio St. 39, 55 N. E. 168, 76 Am. St. Rep. 358, 46 L. R. A. 334; Eastman *v.* State, 6 Ohio S. & C. Pl. Dec. 296, 4 Ohio N. P. 163.

37. People *v.* Gordon, 194 Ill. 560, 62 N. E. 858, 88 Am. St. Rep. 165 [*reversing* 96 Ill. App. 456]; People *v.* Jones, 92 Ill. App. 447.

38. Benham *v.* State, 116 Ind. 112, 18 N. E. 454; People *v.* Somme, 120 N. Y. App Div. 20, 104 N. Y. Suppl. 946 [*affirmed* in 190 N. Y. 541, 83 N. E. 1128].

A sign "Dr. . . . Magnetic Healer," is evidence that one held himself out as a medical practitioner. People *v.* Phippin, 70 Mich. 6, 37 N. W. 888.

Publishing a card as "doctor of neurology and ophthalmology" is a public profession that one is a physician, and this, with the assumption of duties as such, comes within the meaning of the section. State *v.* Wilhite, 132 Iowa 226, 109 N. W. 730.

39. Parks *v.* State, 159 Ind. 211, 64 N. E. 862, 59 L. R. A. 190; People *v.* Somme, 120 N. Y. App. Div. 20, 104 N. Y. Suppl. 946 [*affirmed* in 190 N. Y. 541, 83 N. E. 1128]; State *v.* Yegge, 19 S. D. 234, 103 N. W. 17, 69 L. R. A. 504; Reg. *v.* Baker, 17 Cox C. C. 575, 56 J. P. 406, 66 L. T. Rep. N. S. 416.

A diploma from a regularly organized homeopathic society is sufficient to authorize a member of such society to use the title of "doctor" in the practice of medicine and surgery, and to protect him against the

not subject one to the penalties of the law.[40] Such profession must be made under such circumstances as to indicate that it is made with a view of undertaking to cure the afflicted.[41] But proof of actual treatment is not exacted in all cases.[42] In the absence of a statute on this subject, a statute merely prohibiting the practice of medicine by any person not qualified and licensed will not prohibit the assumption of the title "Doctor" by any person whatever his profession.[43]

(B) *Oculists and Eye Specialists.* It has been held that one holding himself out as an eye specialist holds himself out as a physician and surgeon.[44] But the application by an oculist of liquid to the eye is said to be the practice of surgery rather than of medicine.[45]

(V) *Obstetrics and Midwifery.* A person practising obstetrics[46] or midwifery[47] is within a statute requiring a license for practising medicine or surgery.

(VI) *Selling and Administering Patent Medicines.* Although the mere selling of patent medicines by one who does not pretend to diagnose disease, and determine what remedy is proper, is not a violation of a statute forbidding the practice of medicine by unlicensed persons,[48] still the fact that one gives his own proprietary medicine will not protect him where he attends and prescribes for sick persons and holds himself out as competent to prescribe.[49]

penalties imposed by the statute for using such title and practising without a diploma from some incorporated medical society or college. Raynor *v.* State, 62 Wis. 289, 22 N. W. 430.

Assumption of title signifying registration — Canada.— Under a statute punishing any one who falsely professes to be a registered physician, the mere use of the letters "M. D." without supplemental words implying registration is not sufficient to convict. Foster *v.* Rose, 37 Can. L. J. N. S. 824; Reg. *v.* Tefft, 45 U. C. Q. B. 144.

40. State *v.* Heath, 125 Iowa 585, 101 N. W. 429.

41. State *v.* Heath, 125 Iowa 585, 101 N. W. 429.

An eye expert who invites people to call upon him, but who states that he does not give medical or surgical treatment, does not "profess to cure or treat disease by any drug or application." People *v.* Smith, 208 Ill. 31, 69 N. E. 810.

42. State *v.* Heath, 125 Iowa 585, 101 N. W. 429.

43. State *v.* McKnight, 131 N. C. 717, 42 S. E. 580, 59 L. R. A. 187; State *v.* Mylod, 20 R. I. 632, 40 Atl. 753, 41 L. R. A. 428.

44. Com. *v.* St. Pierre, 175 Mass. 48, 55 N. E. 482.

Statutory provisions.— Under a statute providing that a person shall be regarded as practising medicine who shall treat or profess to treat, operate on or prescribe for, any physical ailment or injury, a person who causes a customer to look at objects on a wall, and therefrom determines what kind of lens he needs to aid his defective vision, and then has glasses ground accordingly and fitted into frames, and delivers such spectacles to his customer, is not required to first take out a license to practise medicine. People *v.* Smith, 208 Ill. 31, 69 N. E. 810 [*affirming* 108 Ill. App. 499]. Nor can such a person be required to take out a license because he advertises for those who have headache, dizziness, etc., to call on him, where the advertisement expressly declares that he does not give medical or surgical treatment, and it is apparent from the entire advertisement that all he professes to do is to fit spectacles to the eye. People *v.* Smith, *supra*. But under a similar statute one who diagnoses his patient's diseases by a microscopic examination of a drop of blood, and treats them by placing them under the rays of electric arc lights, and also incidentally prescribes certain medicines, for which prescription he makes no charge, has been held to be practising medicine. O'Neil *v.* State, 115 Tenn. 427, 90 S. W. 627, 3 L. R. A. N. S. 762, holding further that one who diagnosed his patient's diseases by microscopic examination of a drop of blood, and treated them by placing them under the rays of electric arc lights, is not an optician, within Acts (1901), p. 115, c. 78, excepting opticians from its provisions as to licensing persons practising medicine. Under a statute providing that every person prefixing the title "Dr." to his name, or professing to be a physician, or prescribing any drug, medicine, apparatus, or other agency for the cure of any ailment, shall be regarded as practising medicine, a person engaged in fitting glasses to the eye, who prefixes the title "Dr." to his name, and claims to be an ophthalmologist, is practising medicine. State *v.* Yegge, 19 S. D. 234, 103 N. W. 17, 69 L. R. A. 504.

45. U. S. *v.* Williams, 28 Fed. Cas. No. 16,713, 5 Cranch C. C. 62.

46. State *v.* Welch, 129 N. C. 579, 40 S. E. 120.

47. People *v.* Arendt, 60 Ill. App. 89.

48. State *v.* Kendig, 133 Iowa 164, 110 N. W. 463; State *v.* Van Doran, 109 N. C. 864, 14 S. E. 32; College des Medecins *v.* Tucker, 17 Quebec Super. Ct. 70.

49. *District of Columbia.*— Springer *v.* District of Columbia, 23 App. Cas. 59.

Kansas.— Underwood *v.* Scott, 43 Kan. 714, 23 Pac. 942.

New York.— Thompson *v.* Staats, 15 Wend. 395.

(VII) *SELLING MECHANICAL INSTRUMENTS OR APPLIANCES.* A statute regulating the practice of medicine does not include those who merely advertise, puff, or sell mechanical instruments or devices, although they profess their use will cure human ills.[50] But selling and directing the application of plasters for the cure of cancer is "practising" within the meaning of the statute.[51]

(VIII) *PRACTISING UNDER LICENSED PHYSICIAN.* Liability under a statute prohibiting the practice of medicine without a license is not affected by the fact that the operations were performed and the medicines were administered under the direction and charge of a licensed physician and surgeon.[52]

(IX) *PRACTISING AFTER REFUSAL OF LICENSE.* Where one admits practising without a license, it is no defense to a prosecution therefor that the medical board had wrongfully refused to issue him a license.[53] But the contrary has also been held.[54]

(X) *PRACTISING AFTER REVOCATION OF LICENSE.* Under a statute prescribing a penalty for practising "without first having procured a certificate," a conviction cannot be had for engaging in practice after the certificate has been revoked for unprofessional conduct.[55]

(XI) *PRACTISING WITHOUT FEE OR REWARD.* The penalty for practising medicine without a license is usually limited to the practice for reward or compensation.[56] It is not necessary to show that a separate fee was charged for any specified service or operation, but it is sufficient if a fee was collected for a series of services or operations in violation of the act.[57] Neither is it necessary to show that a charge was made immediately after the service or operation, it being suf-

North Carolina.— State *v.* Van Doran, 109 N. C. 864, 14 S. E. 32.

Ohio.— Jordan *v.* Dayton Overseers of Poor, 4 Ohio 294.

Canada.— Reg. *v.* Coulson, 27 Ont. 59; Reg. *v.* Howarth, 24 Ont. 561; Reg. *v.* Hall, 8 Ont. 407.

50. People *v.* Lehr, 196 Ill. 361, 63 N. E. 725 [*affirming* 93 Ill. App. 505], holding that where a party was agent for the sale of an article or instrument to be attached to parts of the body, which he advertised would cure many diseases, and he urged people to buy it and try it, but he did not claim to be a physician or to practise medicine, did not examine his patrons or attempt to ascertain or tell them what their diseases were, and did not prescribe or administer drugs or remedies, nor apply the instrument to the bodies of purchasers, this was not the practice of medicine within the meaning of the title of the act of 1899, fixing a penalty for the practice of medicine without a certificate.

51. Provincial Medical Bd. *v.* Bond, 22 Nova Scotia 153.

52. State *v.* Reed, 68 Ark. 331, 58 S. W. 40; State *v.* Paul, 56 Nebr. 369, 76 N. W. 861.

53. State *v.* Doerring, 194 Mo. 398, 92 S. W. 489 (holding that if one substantially complies with all the provisions of the statute, and the board wrongfully withholds from him a license, then he must resort to some appropriate remedy to compel the issuance of such license); Krowenstrot *v.* State, 15 Ohio Cir. Ct. 73, 8 Ohio Cir. Dec. 119.

54. State *v.* Cooper, 11 Ida. 219, 81 Pac. 374, 377, where it is said: "If the Board of Medical Examiners could withhold a license from an applicant . . . until he could appeal to the courts for redress, making a criminal of him every time he prescribed for or visited a patient, they could not only deprive him of valuable property rights, but ruin him in his profession, and brand him as a criminal."

55. *Ex p.* McNulty, 77 Cal. 164, 19 Pac. 237, 11 Am. St. Rep. 257.

Pending an appeal from the action of the state board of medical examiners in revoking defendant's license, defendant cannot be convicted of practising without a license, when the judgment of the board is finally reversed. State *v.* Kellogg, 14 Mont. 451, 36 Pac. 1077.

56. See the statutes of the several states. See also State *v.* Pirlot, 20 R. I. 273, 38 Atl. 656, holding that, although Gen. Laws, c. 165, § 2, makes it unlawful to practise medicine without exhibiting and having registered a certificate, yet, as section 8, providing a penalty, limits the fine to the practice of medicine for reward or compensation, section 2 cannot be violated where a medical practitioner receives no compensation for his services.

Thus it is not a violation of the statute for a person who does not hold himself out as a physician to advise, or give medicine to, a sick person, merely as a neighbor or friend, where no charge is made, and no compensation is expected, for such services. Nelson *v.* State, 97 Ala. 79, 12 So. 421.

Nor can a druggist's clerk who prescribes for a customer be convicted under such an act where no profit inures to him from the sale. Prust *v.* Rose, 37 Can. L. J. N. S. 824.

57. State *v.* Littooy, 37 Wash. 693, 79 Pac. 1135; State *v.* Brown, 37 Wash. 106, 79 Pac. 638.

ficient that some time within one year before filing the information a fee was paid for the services alleged to have been rendered.[58]

b. Practising Dentistry. The practice of dentistry has been defined as the treatment of diseases or lesions of the human teeth or jaws, or the correction of malpositions thereof.[59] A statute thus defining dentistry does not prevent a licensed surgeon from treating diseases of the jaws, which may come within the scope both of general surgery and dentistry.[60]

2. Prosecutions For Practising Without Authority[61] — a. Indictment, Information,[62] or Complaint[63] — (i) *In General.* The offense of practising medicine without a license being purely a statutory offense, if the statute so far individuates the crime that the offender has proper notice of the nature of the charge against him, it is sufficient to charge it in the language of the statute or in terms substantially equivalent thereto.[64] It is necessary to state specifically the essential facts constituting the offense.[65] It is not sufficient to sustain a criminal prosecution of this kind merely to charge a person with having "unlawfully" prac-

58. State *v.* Littooy, 37 Wash. 693, 79 Pac. 1135; State *v.* Brown, 37 Wash. 106, 79 Pac. 638.

59. See State *v.* Vandersluis, 42 Minn. 129, 43 N. W. 789, 6 L. R. A. 119.

The taking of an impression, the making of false teeth therefrom, and the fitting of such teeth in the mouth constitute a "correction of malposition of the jaws," within the meaning of the statute regulating the practice of dentistry. State *v.* Newton, 39 Wash. 491, 81 Pac. 1002.

60. State *v.* Vandersluis, 42 Minn. 129, 43 N. W. 789, 6 L. R. A. 119.

61. See, generally, Criminal Law, 12 Cyc. 70.

62. **Indictment or information** generally see Indictments and Informations, 22 Cyc. 155.

63. **Criminal complaint** generally see Criminal Law, 12 Cyc. 291 *et seq.*

64. Parks *v.* State, 159 Ind. 211, 64 N. E. 862, 59 L. R. A. 190; State *v.* Edmunds, 127 Iowa 333, 101 N. W. 431; Com. *v.* Campbell, 22 Pa. Super. Ct. 98 (holding that an indictment charging that defendant did "engage in the practice of medicine and surgery without having complied with the provisions" of the act of May 18, 1893 (Pub. Laws 94), sufficiently sets forth the violation of the act, which forbids any one to "enter upon the practice of medicine or surgery within the state, unless he or she has complied with the provisions of this act"); State *v.* Flanagan, 25 R. I. 369, 55 Atl. 876.

"Practising as a physician" see *infra*, this note.

"Practising medicine" equivalent to "practising as a physician."— An indictment which alleged that defendant did "practise medicine" sufficiently charges that he "practised as a physician," within the meaning of a statute which makes it unlawful for any person to so practise without having a license. Whitlock *v.* Com., 89 Va. 337, 15 S. E. 893.

Practise or attempt to practise.— An indictment for practising medicine without a license, which charges that defendant unlawfully "did practise or attempt to practise medicine or surgery," is not open to the objection that the offenses of practising and attempting to practise are so distinct that the offense is not sufficiently set out. State *v.* Welch, 129 N. C. 579, 40 S. E. 120; State *v.* Van Doran, 109 N. C. 864, 14 S. E. 32.

65. O'Connor *v.* State, 46 Nebr. 157, 64 N. W. 719; Denton *v.* State, 21 Nebr. 445, 32 N. W. 222.

Use of drug, medicine, or other agency.— Under Ohio Rev. St. § 4403c, prohibiting persons from practising medicine, or prescribing, directing, or recommending for the use of any person any drug, medicine, or other agency for the permanent cure or relief of any bodily infirmity, unless a certificate from the board of registers shall be filed, etc., an information charging defendant with having for a fee prescribed, directed, and recommended a system known as "christian science," or other agency of the kind described was recommended or administered, is insufficient. Evans *v.* State, 9 Ohio S. & C. Pl. Dec. 222, 6 Ohio N. P. 129.

Particular branch of medicine.— An information under a statute "to regulate the practice of medicine," and which requires that, before any person engages in the "practice of medicine in any of its branches or departments," he shall comply with certain provisions thereof, need not allege the "particular branch or department" of medicine in which defendant engaged. Antle *v.* State, 6 Tex. App. 202.

In Texas an indictment for unlawfully engaging in the practice of medicine must allege that it was done without a diploma, or else without having a certificate of qualification from some authorized board of medical examiners, as provided by statute, or without having practised five consecutive years in the profession; and it must be alleged that the accused resided or sojourned in the county where such indictment was presented. State *v.* Goldman, 44 Tex. 104; Carribene *v.* State, 3 Tex. App. 262.

There must be a statement of facts showing the doing by the accused person of one or more of the acts included within the **statutory** definition. O'Connor *v.* State, 46

tised medicine in violation of the statute, for this amounts to no more than the statement of a mere legal conclusion.[66]

(II) *FAILURE TO QUALIFY.* Under a statute making it an offense to practise medicine without complying with the provisions thereof respecting qualification, an indictment must expressly negative the fact of defendant having any of the qualifications requisite to the lawful practice of medicine.[67] Thus an indictment which does not allege in some form a failure to register,[68] or a failure to register and obtain a certificate,[69] or a failure to have the certificate recorded,[70] as the case may be, charges no offense. The negation of defendant's qualification must be broad enough to meet the requirements of the statute.[71]

(III) *PERSON PRACTISED UPON.* Since no individual right is infringed by the practice of medicine in violation of the statute, the indictment need not specify on whom defendant practised.[72] Furthermore it has been held that it is not necessary to charge defendant with prescribing medicine for human beings as distinguished from furnishing medicine for domestic animals.[73]

(IV) *REWARD OR COMPENSATION.* Where the statute does not contain the words "fee or reward," an indictment for practising medicine without a license need not charge that defendant practised for "fee or reward."[74]

(V) *NEGATIVING EXCEPTIONS.* The general rule as to exceptions, provisos, and the like is that where the exception or proviso forms a portion of the description of the offense so that the ingredients thereof cannot be accurately and definitely stated if the exception is omitted, then it is necessary to negative the exception or proviso.[75] But where the exception is separable from the description and is not an ingredient thereof, it need not be noticed in the accusation, for it is

Nebr. 157, 64 N. W. 719; State v. Carey, 4 Wash. 424, 30 Pac. 729.

66. Steuben County v. Wood, 24 N. Y. App. Div. 442, 48 N. Y. Suppl. 471; Schaeffer v. State, 113 Wis. 595, 89 N. W. 481, Bardeen, J., delivering the opinion of the court.

The pleader must go further and charge that defendant did practise medicine by doing what the statute says it shall consist in, following the statute as far as applicable so as to bring the charge clearly within it. Dee v. State, 68 Miss. 601, 9 So. 356; Schaeffer v. State, 113 Wis. 595, 89 N. W. 481. But see People v. Phippin, 70 Mich. 6, 37 N. W. 888 [*followed* in White v. Lapeer Cir. Judge, 133 Mich. 93, 94 N. W. 601], holding that the complaint in a prosecution for practising medicine without a license need not specify the particular acts or means by which defendant practised medicine.

67. Blalock v. State, 112 Ga. 338, 37 S. E. 361.

68. State v. Fussell, 45 Ark. 65; Driscoll v. Com., 93 Ky. 393, 20 S. W. 431, 703, 14 Ky. L. Rep. 376.

69. State v. Welch, 129 N. C. 579, 40 S. E. 120 (holding that an indictment for practising medicine without a license, which alleges that defendant did not exhibit to the clerk a license, nor make the oath necessary to procure registration, and did practise, "not then and there having obtained from said Clerk of the Court a certificate of registration," sufficiently charges that defendant "did not register and obtain" a license); State v. Call, 121 N. C. 643, 28 S. E. 517.

70. State v. Hathaway, 106 Mo. 236, 17 S. W. 299.

71. State v. Goldman, 44 Tex. 104.

72. People v. Phippin, 70 Mich. 6, 37 N. W. 888; State v. Doerring, 194 Mo. 398, 92 S. W. 489; State v. Little, 76 Mo. 52; State v. Smith, 60 Mo. App. 283; State v. Van Doran, 109 N. C. 864, 14 S. E. 32; State v. Martin, 23 R. I. 143, 49 Atl. 497.

73. State v. Kendig, 133 Iowa 164, 110 N. W. 463.

74. State v. Welch, 129 N. C. 579, 40 S. E. 120; State v. Call, 121 N. C. 643, 28 S. E. 517. See also Whitlock v. Com., 89 Va. 337, 15 S. E. 893.

Even where, by statutory definition, the words "practise medicine" embrace the idea of exacting compensation, an indictment charging that the accused did unlawfully "practise medicine," and expressly negativing his having any of the qualifications essential to the lawful practice of medicine has been held to be good in substance, and sufficient to support a conviction, although there be no allegation that the accused received or intended to receive compensation. Blalock v. State, 112 Ga. 338, 37 S. E. 361.

75. Salter v. State, 44 Tex. Cr. 591, 73 S. W. 395; McCann v. State, 40 Tex. Cr. 111, 48 S. W. 512. See also INDICTMENTS AND INFORMATIONS, 22 Cyc. 344.

Where the statute includes two or more classes which will be affected thereby — such as physicians who remove into the state to practise after the passage of an act to regulate the same, and persons who were residing in the state and practising under a former act — the information must show on its face that the accused does not belong to either class. Herring v. State, 114 Ga. 96, 39 S. E. 866; Gee Wo v. State, 36 Nebr. 241, 54 N. W. 513.

a matter of defense.[76] The rule as sometimes stated is that, if the exception is found in the enacting clause, it must be negatived; but if found in a subsequent clause, it need not be.[77] The negative averment is taken as true, unless disproved by defendant, since the subject-matter of such averment lies peculiarly within his knowledge.[78]

(VI) *JOINDER OF OFFENSES.* Where the offense of practising medicine without authority may be committed in one or more of several ways, the indictment may, in a single count, charge its commission in any or all of the ways specified, if they are not repugnant.[79]

b. Defenses. On a prosecution for practising medicine without a license, the defense of discrimination against a particular class of practitioners is of no avail.[80]

c. Evidence[81]—(I) *PRESUMPTIONS AND BURDEN OF PROOF.* On an indictment for practising medicine without a license from the board of medical examiners, as required by law, the prosecution must show the existence of such board of examiners, legally constituted, and a conviction cannot be sustained where there was no such board *de jure*.[82] Furthermore the state must prove beyond a reasonable doubt that defendant did practise medicine without a license.[83] After such proof has been introduced on the part of the prosecution, the burden is on the accused to show that he had a license[84] or other qualification to practise as required by law,[85] as such evidence is not accessible to the state, but is peculiarly within defendant's knowledge, and under his control.[86] So one who seeks protection by reason of an exception contained in the statute has the burden of proving that he comes within the same.[87]

(II) *ADMISSIBILITY.* Any competent evidence tending to show that defendant held himself out as a medical practitioner is admissible,[88] and such evidence is not

76. *Colorado.*— Harding *v.* People, 10 Colo. 387, 15 Pac. 727.

Illinois.— Williams *v.* People, 20 Ill. App. 92.

Iowa.— State *v.* Kendig, 133 Iowa 164, 110 N. W. 463.

Maryland.— Watson *v.* State, 105 Md. 650, 66 Atl. 635.

Michigan.— People *v.* Allen, 122 Mich. 123, 80 N. W. 991; People *v.* Phippin, 70 Mich. 6, 37 N. W. 888.

Missouri.— State *v.* Smith, 60 Mo. App. 283.

Nebraska.— O'Connor *v.* State, 46 Nebr. 157, 64 N. W. 719; Gee Wo *v.* State, 36 Nebr. 241, 54 N. W. 513.

New Jersey.— Mayer *v.* State, 64 N. J. L. 323, 45 Atl. 624.

North Carolina.— State *v.* Welch, 129 N. C. 579, 40 S. E. 120; State *v.* Call, 121 N. C. 643, 28 S. E. 517.

Ohio.— Hale *v.* State, 58 Ohio St. 676, 51 N. E. 154; Krowenstrot *v.* State, 15 Ohio Cir. Ct. 73, 8 Ohio Cir. Dec. 119.

Rhode Island.— State *v.* Flanagan, 25 R. I. 369, 55 Atl. 876.

See 39 Cent. Dig. tit. "Physicians and Surgeons," § 9. See also INDICTMENTS AND INFORMATIONS, 22 Cyc. 344.

77. Ferner *v.* State, 151 Ind. 247, 51 N. E. 360; Steuben County *v.* Wood, 24 N. Y. App. Div. 442, 48 N. Y. Suppl. 471; Antle *v.* State, 6 Tex. App. 202; Logan *v.* State, 5 Tex. App. 306; Blasdell *v.* State, 5 Tex. App. 263.

78. State *v.* Hathaway, 115 Mo. 36, 21 S. W. 1081.

79. State *v.* Wilhite, 132 Iowa 226, 109 N. W. 730; Hale *v.* State, 58 Ohio St. 676, 51 N. E. 154.

80. Bragg *v.* State, 134 Ala. 165, 32 So. 767, 58 L. R. A. 925, since, if true, the remedy is in the civil courts, on rejection of an application for a license, and not by a violation of the criminal law.

81. Evidence generally see CRIMINAL LAW, 12 Cyc. 379 *et seq.*; EVIDENCE, 16 Cyc. 821 *et seq.*

82. U. S. *v.* Williams, 28 Fed. Cas. No. 16,713, 5 Cranch C. C. 62.

83. Benham *v.* State, 116 Ind. 112, 18 N. E. 454.

84. People *v.* Boo Doo Hong, 122 Cal. 606, 55 Pac. 402; Kettles *v.* People, 221 Ill. 221, 77 N. E. 472; Williams *v.* People, 20 Ill. App. 92; Benham *v.* State, 116 Ind. 112, 18 N. E. 454; People *v.* Fulda, 52 Hun (N. Y.) 65, 4 N. Y. Suppl. 945, 7 N. Y. Cr. 1; People *v.* Nyce, 34 Hun (N. Y.) 298.

85. Morris *v.* State, 117 Ga. 1, 43 S. E. 368; State *v.* Wilson, 62 Kan. 621, 64 Pac. 23, 52 L. R. A. 679; Com. *v.* St. Pierre, 175 Mass. 48, 55 N. E. 482; Raynor *v.* State, 62 Wis. 229, 22 N. W. 430.

86. People *v.* Boo Doo Hong, 122 Cal. 606, 55 Pac. 402; State *v.* Wilson, 62 Kan. 621, 64 Pac. 23, 52 L. R. A. 679.

87. State *v.* Hicks, 143 N. C. 689, 57 S. E. 441.

88. Springer *v.* District of Columbia, 23 App. Cas. (D. C.) 59.

Where respondent exhibited a sign as "Dr. . . . Magnetic Healer," and was called in to visit sick persons, and treated them, and made a certificate of death, and a medical practitioner's sworn statement, there is evi-

rendered inadmissible by the rule that the state is not allowed to put in issue the general character of defendant.[89] On behalf of defendant any legal evidence tending to show that he had rightful authority to practise, or that he was not guilty of the offense charged, is admissible.[90] The court will not compel a witness to produce the medicine which he received from defendant.[91]

(III) *WEIGHT AND SUFFICIENCY.*[92] In a prosecution against one for practising as a physician without a diploma, the existence of the diploma is *prima facie* evidence of a right to it.[93] In some states it is provided by statute that the use by a person of the title "Dr.," "Doctor," etc., or the exposure of a sign, circular, or advertisement indicating the occupation of the person shall be *prima facie* evidence that he is practising medicine.[94] Proof that defendant attended a single case and held himself out to the community as a physician is sufficient to warrant a conviction.[95] Although defendant, to constitute guilt, must have practised for compensation and reward, the state need not prove the actual receipt of such compensation.[96] Uncorroborated testimony of employees of a dental society may be sufficient to support a conviction.[97]

d. Variance. Proof that defendant acted either as a physician or surgeon is sufficient to support an information charging that he held himself out as a physi-

dence that he held himself out as a medical practitioner. People *v.* Phippin, 70 Mich. 6, 37 N. W. 888.

A medical practitioner's sworn statement, a certificate of death, and a report of infectious diseases, executed by respondent, are admissible to show that he held himself out as a medical practitioner. People *v.* Phippin, 70 Mich. 6, 37 N. W. 888.

A business card of defendant, containing his name, with the title "Dr." prefixed, and advertising himself as pharmacist and chemist, and with having a free dispensary at his place of business, where registered physicians were in attendance daily to give medical and surgical advice free of charge, is admissible as a declaration of defendant tending to prove that he had been engaged in carrying on the prohibited business, which was corroborative of the proof offered in support of the offense charged. Mayer *v.* State, 64 N. J. L. 323, 45 Atl. 624.

89. Antle *v.* State, 6 Tex. App. 202.

90. See cases cited *infra*, this note.

Services rendered without compensation.— Com. *v.* St. Pierre, 175 Mass. 48, 55 N. E. 482.

Possession of diploma.— In a prosecution under Wis. Laws (1881), c. 256, § 1, prohibiting a person from prefixing the title of "doctor" to his name without having a diploma from a duly incorporated medical society or college, it is error to reject a diploma offered in evidence by defendant, on the ground that its articles of incorporation did not declare that such power existed, it not being necessary that the articles of incorporation of a medical college should designate with particularity all the powers which it may exercise when duly incorporated. Wendel *v.* State, 62 Wis. 300, 22 N. W. 435. But in a prosecution of a physician for practising without a certificate countersigned by the senior censor of the state medical association, in violation of Ala. Code (1896), § 5333, defendant's diploma and proof of the length of time he practised medicine are inadmissible. Brooks *v.* State, 146 Ala. 153, 41 So. 156.

Evidence that other physicians had no certificates is inadmissible. Brooks *v.* State, 146 Ala. 153, 41 So. 156.

Refusal to issue certificate.— A person charged with having practised medicine without a proper certificate cannot show that the state board acted unjustly in refusing him one. Krowenstrot *v.* State, 15 Ohio Cir. Ct. 73, 8 Ohio Cir. Dec. 119; State *v.* Littooy, 37 Wash. 693, 79 Pac. 1135; State *v.* Brown, 37 Wash. 106, 79 Pac. 638.

91. U. S. *v.* Williams, 28 Fed. Cas. No. 16,713, 5 Cranch C. C. 62.

92. **Evidence held sufficient to justify conviction** see Ferner *v.* State, 151 Ind. 247, 51 N. E. 360; Benham *v.* State, 116 Ind. 112, 18 N. E. 454; State *v.* Kendig, 133 Iowa 164, 110 N. W. 463; State *v.* Hoff, 75 Kan. 585, 90 Pac. 279, 12 L. R. A. N. S. 1094; State *v.* Oredson, 96 Minn. 509, 105 N. W. 188; People *v.* Somme, 120 N. Y. App. Div. 20, 104 N. Y. Suppl. 946 [*affirmed* in 190 N. Y. 541, 83 N. E. 1128]; Payne *v.* State, 112 Tenn. 587, 79 S. W. 1025; State *v.* Lawson, 40 Wash. 455, 82 Pac. 750; State *v.* Sexton, 37 Wash. 110, 79 Pac. 634.

93. Wendel *v.* State, 62 Wis. 300, 22 N. W. 435; Raynor *v.* State, 62 Wis. 289, 22 N. W. 430.

94. Mayer *v.* State, 64 N. J. L. 323, 45 Atl. 624.

But evidence that there appeared in a certain newspaper an advertisement of a doctor having the same name as accused is insufficient to warrant a conviction, since it cannot be presumed that the advertisement was authorized by defendant, nor that he was the person named in the advertisement. State *v.* Dunham, 31 Wash. 636, 72 Pac. 459.

95. Antle *v.* State, 6 Tex. App. 202.

96. State *v.* Hale, 15 Mo. 606.

97. People *v.* Stein, 112 N. Y. App. Div. 896, 97 N. Y. Suppl. 923.

cian and surgeon.[98] So proof that defendant engaged in any branch or department of medicine sustains the allegation that he engaged in the practice of medicine.[99] Since the time of the commission of the offense is not of the essence thereof, it is not necessary to prove that the offense charged was committed on the precise date alleged; proof that it occurred on any day within the period of limitation and before the filing of the information is sufficient.[1]

e. Questions For Jury.[2] Where a statute regulating the practice of medicine does not declare what specific acts shall constitute "practising medicine," or what it is to "publicly profess to do so," both of which are prohibited unless the person so doing has obtained a license, it is for the courts to determine whether the facts and proof in a particular case bring it within the terms of the statute, taking these in the sense in which they are commonly understood.[3] But where the acts which shall constitute the practice of medicine are defined by statute, whether or not defendant has, by his conduct, brought himself within such definition, is a question for the jury.[4]

f. Instructions. The instructions must conform to the pleadings and the evidence.[5] Where, under the statute, the possession of either a license or a diploma would preserve a physician from prosecution, it is error to instruct that if defendant had practised medicine without having a license and a diploma the jury should convict.[6] It is not necessary for the court to instruct the jury as to the law of costs in case of acquittal.[7]

g. Verdict. Upon an indictment under a statute which makes it a misdemeanor for any person to practise medicine for fee or reward without a license, a special verdict which does not find that defendant practised "for fee or reward" will not justify a conviction.[8]

h. Review[9] — (i) *In General.* The admission of incompetent evidence which could not have harmed defendant is not reversible error.[10] Where the charge of the court is not in the record, it will be presumed that the jury were properly instructed as to the offense for which defendant was on trial.[11]

(ii) *Record.* The record of a summary conviction under the Ontario Medical Act[12] for illegally practising medicine must set out the particular act or acts which constitute the practising;[13] and should, if possible, state the facts necessary to bring it within the statute.[14]

i. Effect of Conviction. Where the offense denounced by the statute is of such a continuous nature as to subject the violator to but one conviction for

98. Com. v. St. Pierre, 175 Mass. 48, 55 N. E. 482.

99. Antle v. State, 6 Tex. App. 202.

1. Kettles v. People, 221 Ill. 221, 77 N. E. 472; State v. Littooy, 37 Wash. 693, 79 Pac. 1135; State v. Brown, 37 Wash. 106, 79 Pac. 638.

2. Right to trial by jury in prosecutions for practising without authority see JURIES, 24 Cyc. 142 *et seq.*

3. Springer v. District of Columbia, 23 App. Cas. (D. C.) 59.

4. State v. Heath, 125 Iowa 585, 101 N. W. 429.

5. State v. Heffernan, 28 R. I. 20, 65 Atl. 284, holding that an instruction that a person who uses neither drugs nor medicine cannot be said to engage in the practice of medicine was inapplicable where the evidence showed that defendant used nerve food which he claimed supplied the capillary nerves of the entire body, and was very good for all ailments.

6. Aldenhoven v. State, 42 Tex. Cr. 6, 56 S. W. 914.

7. Com. v. Clymer, 30 Pa. Super. Ct. 61.

8. State v. Call, 121 N. C. 643, 28 S. E. 517.

9. Review generally see CRIMINAL LAW, 12 Cyc. 331 *et seq.*, 792 *et seq.*

10. Raynor v. State, 62 Wis. 289, 22 N. W. 430.

11. Richardson v. State, 47 Ark. 562, 2 S. W. 187.

12. Ont. Rev. St. (1897) c. 176, § 49; Ont. Rev. St. (1887) c. 148, § 45.

13. Reg. v. Whelan, 4 Can. Cr. Cas. 277; Reg. v. Coulson, 24 Ont. 246.

14. Reg. v. Hessel, 44 U. C. Q. B. 51. See also CRIMINAL LAW, 12 Cyc. 328 *et seq.*

Insufficient statement.—A conviction stating the offense as having been committed between dates specified, by prescribing, etc., for a certain person will be set aside if the evidence discloses no offense as regards the attendance upon such person; and it cannot be sustained by proof of altogether separate offenses shown to have been committed within the stated time as regards other persons. Reg. v. Whelan, 4 Can. Cr. Cas. 277.

the whole period of time next before the institution of the prosecution, a conviction under one indictment is a bar to proceedings under other similar indictments for previous acts, although each in itself constituted the practise of medicine.[15]

III. RELATION TO PATIENT.

A. Nature of Relation. The relation of a physician to his patient is one of trust and confidence, and while such relation does not *per se* forbid the acceptance of a gift or conveyance by him from his patient,[16] the burden is on the physician to prove that such gift or conveyance was fairly and honestly obtained, and that the transaction was above suspicion.[17] Any settlement made by a patient through his physician, in consequence of advice given *mala fide*, will be set aside.[18]

B. Degree of Skill and Care Required — 1. General Rule — a. As to Ordinary Practitioners. A physician or surgeon undertaking the treatment of a patient is not required to exercise the highest degree of skill possible. He is only required to possess and exercise that degree of skill and learning ordinarily possessed and exercised by the members of his profession in good standing, practising in similar localities, and it is his duty to use reasonable care and diligence in the exercise of his skill and the application of his learning, and to act according to his best judgment.[19]

15. Wilson *v.* Com., 119 Ky. 769, 82 S. W. 427, 26 Ky. L. Rep. 685.

16. Audenreid's Appeal, 89 Pa. St. 114, 33 Am. Rep. 731; Audenreid *v.* Walker, 11 Phila. (Pa.) 183.

17. Unruh *v.* Lukens, 166 Pa. St. 324, 31 Atl. 110, holding that the fairness of such a transaction is not established by evidence that the physician rendered professional services for a number of years without compensation, where he does not attempt to fix their value.

18. Rowe *v.* Grand Trunk R. Co., 16 U. C. C. P. 500. See also Contracts, 9 Cyc. 458.

19. *Alabama.*— McDonald *v.* Harris, 131 Ala. 359, 31 So. 548.

Connecticut.— Landon *v.* Humphrey, 9 Conn. 209, 23 Am. Dec. 333.

Illinois.— Quinn *v.* Donovan, 85 Ill. 194; Hallam *v.* Means, 82 Ill. 379, 25 Am. Rep. 328; McNevins *v.* Lowe, 40 Ill. 209; Ritchey *v.* West, 23 Ill. 385; Holtzman *v.* Hoy, 19 Ill. App. 459.

Iowa.— Peck *v.* Hutchinson, 88 Iowa 320, 55 N. W. 511; Bowman *v.* Woods, 1 Greene 441.

Kansas.— Branner *v.* Stormont, 9 Kan. 51; Tefft *v.* Wilcox, 6 Kan. 46.

Maine.— Ramsdell *v.* Grady, 97 Me. 319, 54 Atl. 763; Cayford *v.* Wilbur, 86 Me. 414, 29 Atl. 1117; Patten *v.* Wiggin, 51 Me. 594, 81 Am. Dec. 593; Simonds *v.* Henry, 39 Me. 155, 63 Am. Dec. 611; Howard *v.* Grover, 28 Me. 97, 48 Am. Dec. 478.

Maryland.— State *v.* Housekeeper, 70 Md. 162, 16 Atl. 382, 14 Am. St. Rep. 340, 2 L. R. A. 587.

Michigan.— Hesse *v.* Knippel, 1 Mich. N. P. 109.

Minnesota.— Getchell *v.* Hill, 21 Minn. 464.

Missouri.— McMurdock *v.* Kimberlin, 23 Mo. App. 523.

Nebraska.— Van Skike *v.* Potter, 53 Nebr. 28, 73 N. W. 295; Hewitt *v.* Eisenhart, 36 Nebr. 794, 55 N. W. 252.

New Hampshire.— Leighton *v.* Sargent, 27 N. H. 460, 59 Am. Dec. 388.

New York.— Pike *v.* Honsinger, 155 N. Y. 201, 49 N. E. 760, 63 Am. St. Rep. 655; Link *v.* Sheldon, 136 N. Y. 1, 32 N. E. 696; Carpenter *v.* Blake, 60 Barb. 488 [*reversed* on other grounds in 50 N. Y. 696]; Bellinger *v.* Craigue, 31 Barb. 534; Graves *v.* Santway, 2 Silv. Sup. 67, 6 N. Y. Suppl. 892; Rowe *v.* Lent, 17 N. Y. Suppl. 131; Becker *v.* Janinski, 15 N. Y. Suppl. 675, 27 Abb. N. Cas. 45; Wells *v.* World's Dispensary Medical Assoc., 9 N. Y. St. 452.

Ohio.— Gillette *v.* Tucker, 67 Ohio St. 106, 65 N. E. 865, 93 Am. St. Rep. 639; Tish *v.* Welker, 5 Ohio S. & C. Pl. Dec. 725, 7 Ohio N. P. 472.

Oregon.— Langford *v.* Jones, 18 Oreg. 307, 22 Pac. 1064; Heath *v.* Glisan, 3 Oreg. 64.

Pennsylvania.— McCandless *v.* McWha, 22 Pa. St. 261; Wohlert *v.* Seibert, 23 Pa. Super. Ct. 213; Braunberger *v.* Cleis, 13 Am. L. Reg. 587; Haire *v.* Reese, 7 Phila. 138.

Tennessee.— Wood *v.* Clapp, 4 Sneed 65.

England.— Lanphier *v.* Phipos, 8 C. & P. 475, 34 E. C. L. 844.

See 39 Cent. Dig. tit. "Physicians and Surgeons," § 21.

"The physician . . . is not a guarantor, without express contract, of the good effects of his treatment, but he only undertakes to do what can ordinarily be done under similar circumstances." Ordronaux Jur. Med. 42 [*quoted* in Ely *v.* Wilbur, 49 N. J. L. 685, 10 Atl. 358, 441, 60 Am. Rep. 668].

An oculist who treats a patient must exercise the care and skill usually exercised by oculists in good standing, and is liable for gross mistakes. Stern *v.* Lanng, 106 La. 738, 31 So. 303.

A veterinary surgeon, in the absence of a special contract, engages to use such reasonable skill, diligence, and attention as may be ordinarily expected of persons in that profession. He does not undertake to use the

b. As to Specialists. A physician holding himself out as having special knowledge and skill in the treatment of particular diseases is bound to bring to the discharge of his duty to a patient employing him as such specialist, not merely the average degree of skill possessed by general practitioners, but that special degree of skill and knowledge possessed by physicians who are specialists in the treatment of such disease, in the light of the present state of scientific knowledge.[20]

2. Necessity of Following Professed or Recognized School, System, or Treatment. Physicians are bound by what is universally settled in the profession;[21] but the mere fact that writers on the treatment of a certain ailment or practical surgeons prescribe a certain mode of treatment does not make it incumbent on a surgeon called to treat the ailment to conform to such system.[22] If the case is a new one, the patient must trust the skill and experience of the physician called, and likewise, if his injury or disease is attended with injury to other parts, or other diseases develop for which there is no established mode of treatment;[23] but where the settled practice allows but one course of medical treatment in the case, any departure of a physician therefrom may be regarded as the result of want of knowledge or attention.[24] Where there are different schools of practice, all that any physician undertakes is that he understands and will faithfully treat the case according to the recognized rules of his particular school.[25] To constitute a school of medicine under this rule, it must have rules and principles of practice for the guidance of all its members, as respects principles, diagnosis, and remedies, which each member is supposed to observe in any given case.[26]

highest degree of skill, nor an extraordinary amount of diligence. Barney *v.* Pinkham, 29 Nebr. 350, 45 N. W. 694, 26 Am. St. Rep. 389.

"Ordinary skill," within the meaning of the rule that a physician or surgeon is only required to exercise ordinary care and skill, means such degree of skill as is commonly possessed by men engaged in the same profession. Boon *v.* Murphy, 108 N. C. 187, 12 S. E. 1032; Heath *v.* Gilsan, 3 Oreg. 64.

In use of X-rays.— In an action against a physician for negligence in applying to plaintiff's body X-rays to locate a foreign substance thought to be in his lungs, the rule of liability is the same as in other actions for malpractice, requiring ordinary care and prudence. Henslin *v.* Wheaton, 91 Minn. 219, 97 N. W. 882, 103 Am. St. Rep. 504, 64 L. R. A. 126.

Effect of refusal of assistance from other physicians.— The measure of skill which a physician is bound to exercise is not affected by his refusal of the proffer of assistance from other physicians. Potter *v.* Warner, 91 Pa. St. 362, 36 Am. Rep. 668.

The term "duties of physician," as used in a contract with a physician and surgeon for their performance, includes in its general and ordinary acceptation surgery, as well as the administration of medicine. Wetherell *v.* Marion County, 28 Iowa 22. See Clinton County *v.* Ramsey, 20 Ill. App. 577, for similar interpretation of words "medical treatment."

20. Baker *v.* Hancock, 29 Ind. App. 456, 63 N. E. 323, 64 N. E. 38, holding further that the question when a physician becomes a specialist is not one of law, but one of fact primarily for his own determination; but, when he holds himself out as a specialist, it becomes his duty to use that degree of skill which such a practitioner of necessity should possess.

21. Burnham *v.* Jackson, 1 Colo. App. 237, 28 Pac. 250; Tefft *v.* Wilcox, 6 Kan. 46; Hesse *v.* Knippel, 1 Mich. N. P. 109, where it is said that a physician cannot try experiments with his patients to their injury.

22. Burnham *v.* Jackson, 1 Colo. App. 237, 28 Pac. 250.

23. Carpenter *v.* Blake, 60 Barb. (N. Y.) 488 [*reversed* on other grounds in 50 N. Y. 696].

24. Patten *v.* Wiggin, 51 Me. 594, 81 Am. Dec. 593; Carpenter *v.* Blake, 60 Barb. (N. Y.) 488 [*reversed* on other grounds in 50 N. Y. 696], holding that if writers on the treatment of dislocations, or if, in the absence of such authority, practical surgeons, prescribe a mode of reducing them, and of treating the joint after the bones are replaced, it is incumbent on surgeons called to treat such an injury to conform to the system of treatment thus established; and, if they depart from it, they do it at their peril.

25. Force *v.* Gregory, 63 Conn. 167, 27 Atl. 1116, 38 Am. St. Rep. 371, 22 L. R. A. 343; Bowman *v.* Woods, 1 Greene (Iowa) 441; Patten *v.* Wiggin, 51 Me. 594, 81 Am. Dec. 593; Martin *v.* Courtney, 75 Minn. 255, 77 N. W. 813.

Known and recognized system.— It is sufficient if the practitioner follow a known and recognized system. Williams *v.* Poppleton, 3 Oreg. 139.

26. Grainger *v.* Still, 187 Mo. 197, 85 S. W. 1114, 70 L. R. A. 49; Nelson *v.* Harrington, 72 Wis. 591, 40 N. W. 228, 7 Am. St. Rep. 900, 1 L. R. A. 719. See also Longan *v.* Weltmer, 180 Mo. 322, 79 S. W.

3. Depending on Nature or Character of Injury or Disease. Whatever may be the character of the injury or disease a physician is called on to treat, he is only held to employ reasonable care and skill, to exercise only that degree of skill which is ordinarily possessed by members of the profession in like localities. He is not required to exercise care and skill proportionate to the character of the injury or disease he treats, and he is not liable if he does not treat a severe injury with such skill as its severity reasonably demands.[27]

4. Depending on State of Profession. In determining the degree of learning and skill required of a physician, regard must be had to the state of medical science at the time.[28] It has been held erroneous, however, to charge that the skill required is such as thoroughly educated physicians ordinarily exercise, as this lays down too high a test.[29]

5. Depending on Locality of Practice. Although there are some authorities which tend to support the rule that a physician is bound to exercise only such a degree of care as is ordinarily exercised in his profession in the particular locality in which he practises,[30] the better and more correct rule is that a physician and surgeon is required to exercise that degree of knowledge, skill, and care which physicians and surgeons practising in similar localities ordinarily possess.[31]

655, 103 Am. St. Rep. 573, 64 L. R. A. 969.

Christian science and clairvoyancy not being recognized schools of medicine, one who professes to cure disease by those systems of treatment must be held to the standard of care of the ordinary physician in good standing. Nelson *v.* Harrington, 72 Wis. 591, 40 N. W. 228, 7 Am. St. Rep. 900, 1 L. R. A. 719. *Contra*, Spead *v.* Tomlinson, 73 N. H. 46, 59 Atl. 376, 68 L. R. A. 432.

27. Utley *v.* Burns, 70 Ill. 162.

28. *Indiana.*— Baker *v.* Hancock, 29 Ind. App. 456, 63 N. E. 323, 64 N. E. 38.

Iowa.— Ferrell *v.* Ellis, 129 Iowa 614, 105 N. W. 993; Peck *v.* Hutchinson, 88 Iowa 320, 55 N. W. 511; Almond *v.* Nugent, 34 Iowa 300, 11 Am. Rep. 147; Smothers *v.* Hanks, 34 Iowa 286, 11 Am. Rep. 141.

Michigan.— Hitchcock *v.* Burgett, 38 Mich. 501.

Minnesota.— Staloch *v.* Holm, 100 Minn. 276, 111 N. W. 264, 9 L. R. A. N. S. 712.

North Carolina.— McCracken *v.* Smathers, 122 N. C. 799, 29 S. E. 354.

Ohio.— Gillette *v.* Tucker, 67 Ohio St. 106, 65 N. E. 865, 93 Am. St. Rep. 639.

Pennsylvania.— English *v.* Free, 205 Pa. St. 624, 55 Atl. 777; McCandless *v.* McWha, 22 Pa. St. 261; Haire *v.* Reese, 7 Phila. 138.

Rhode Island.— Bigney *v.* Fisher, 26 R. I. 402, 59 Atl. 72.

West Virginia.— Dye *v.* Corbin, 59 W. Va. 266, 53 S. E. 147.

See 39 Cent. Dig. tit. "Physicians and Surgeons," § 26.

29. Peck *v.* Hutchinson, 88 Iowa 320, 55 N. W. 511; Hitchcock *v.* Burgett, 38 Mich. 501. But see McCandless *v.* McWha, 22 Pa. St. 261.

The true measure is that degree of skill ordinarily exercised in the profession by the members thereof as a body, the average of the skill and diligence ordinarily exercised by the profession as a whole; not that exercised by the thoroughly educated, nor yet that exercised by the moderately educated, nor merely of the well educated, but the average. Almond *v.* Nugent, 34 Iowa 300, 11 Am. Rep. 147; Smothers *v.* Hanks, 34 Iowa 286, 11 Am. Rep. 141.

30. Wood *v.* Wyeth, 106 N. Y. App. Div. 21, 94 N. Y. Suppl. 360; Hathorn *v.* Richmond, 48 Vt. 557.

31. *Indiana.*— Gramm *v.* Boener, 56 Ind. 497, 501 (where it was said: "It will not do, as we think, to say, that if a surgeon or physician has exercised such a degree of skill as is ordinarily exercised in the particular locality in which he practises, it will be sufficient. There might be but few practising in the given locality, all of whom might be quacks, ignorant pretenders to knowledge not possessed by them, and it would not do to say, that, because one possessed and exercised as much skill as the others, he could not be chargeable with the want of reasonable skill"); Thomas *v.* Dabblemont, 31 Ind. App. 146, 67 N. E. 463; Baker *v.* Hancock, 29 Ind. App. 456, 63 N. E. 323, 64 N. E. 38].

Iowa.— Ferrell *v.* Ellis, 128 Iowa 614, 105 N. W. 993; Dunbauld *v.* Thompson, 109 Iowa 199, 80 N. W. 324; Whitesell *v.* Hill, 101 Iowa 629, 70 N. W. 750, 37 L. R. A. 830. But see Whitesell *v.* Hill, (1896) 66 N. W. 894.

Kentucky.— Burk *v.* Foster, 114 Ky. 20, 69 S. W. 1096, 24 Ky. L. Rep. 791, 59 L. R. A. 277; Dorris *v.* Warford, 100 S. W. 312, 30 Ky. L. Rep. 963, 9 L. R. A. N. S. 1090.

Massachusetts.— Small *v.* Howard, 128 Mass. 131, 35 Am. Rep. 363.

North Carolina.— McCracken *v.* Smathers, 122 N. C. 799, 29 S. E. 354.

Rhode Island.— Bigney *v.* Fisher, 26 R. I. 402, 59 Atl. 72.

West Virginia.— Dye *v.* Corbin, 59 W. Va. 266, 53 S. E. 147.

Canada.— Zirkler *v.* Robertson, 30 Nova Scotia 61.

See 39 Cent. Dig. tit. "Physicians and Surgeons," § 27.

6. Depending on Compensation. The fact that a physician or surgeon renders his services gratuitously does not absolve him from the duty to use reasonable and ordinary care, skill, and diligence.[32] But if one does not profess to be a physician, or to practise as such, and is merely asked his advice as a friend or neighbor, he incurs no professional responsibility.[33]

7. Insurance of Cure or Benefit. In the absence of a special contract to that effect,[34] a physician does not warrant or insure that his treatment will be successful or even beneficial,[35] and he is not responsible in damages for want of success, unless it be shown to result from a want of ordinary skill or diligence.[36]

8. In Determining Nature of Injury or Malady and Mode of Treatment. A physician or surgeon is bound to use reasonable knowledge and care in learning the condition of his patient, in ascertaining if an operation is necessary, in determining whether the time and place are proper, and in making a diagnosis of the case.[37]

9. In Discontinuing Attendance. A physician, responding to the call of a patient, thereby becomes engaged, in the absence of a special agreement, to attend to the case, so long as it requires attention, unless he gives notice to the contrary

32. McNevins *v.* Lowe, 40 Ill. 209; Du Bois *v.* Decker, 130 N. Y. 325, 29 N. E. 313, 27 Am. St. Rep. 529, 14 L. R. A. 429; Becker *v.* Janinski, 15 N. Y. Suppl. 675, 27 Abb. N. Cas. 45; Gladwell *v.* Steggall, 5 Bing. N. Cas. 733, 3 Jur. 535, 8 L. J. C. P. 361, 8 Scott 60, 35 E. C. L. 391. See also Peck *v.* Hutchinson, 88 Iowa 320, 55 N. W. 511.

33. McNevins *v.* Lowe, 40 Ill. 209; Ritchey *v.* West, 23 Ill. 385; Higgins *v.* McCabe, 126 Mass. 13, 30 Am. Rep. 642.

34. *Connecticut.*— Styles *v.* Tyler, 64 Conn. 432, 30 Atl. 165.

New York.— Bronson *v.* Hoffman, 7 Hun 674.

Ohio.— Craig *v.* Chambers, 17 Ohio St. 253.

Oklahoma.— Champion *v.* Kieth, 17 Okla. 204, 87 Pac. 845.

West Virginia.— Dye *v.* Corbin, 59 W. Va. 266, 53 S. E. 147.

United States.— Ewing *v.* Goode, 78 Fed. 442.

See 39 Cent. Dig. tit. "Physicians and Suregons," § 23.

Express promise necessary.— An allegation in the declaration in an action for misconduct in setting a fractured bone that defendant promised to perfect a cure can only be sustained by positive proof of an express promise, as the law does not raise, by implication, such an undertaking. Grindle *v.* Rush, 7 Ohio, Pt. II, 123.

Illustration of contract.— Where a dentist inserted in a receipted bill, given for the price of a set of teeth, the words "warranted for one year; and if on trial they cannot be made useful, the teeth to be returned and the money refunded," if the purchaser, by a fair trial of the teeth, according to the instructions given him at the time they were delivered, could not make them useful, he had a right to return them within a year and recover the price. Davis *v.* Ball, 6 Cush. (Mass.) 505, 53 Am. Dec. 53.

35. *Illinois.*— Quinn *v.* Donovan, 85 Ill. 194; McKee *v.* Allen, 94 Ill. App. 147; Yunker *v.* Marshall, 65 Ill. App. 667.

Kansas.— Tefft *v.* Wilcox, 6 Kan. 46.

Missouri.— Vanbooser *v.* Berghoff, 90 Mo. 487, 3 S. W. 72; Logan *v.* Field, 75 Mo. App. 594.

New York.— Pike *v.* Honsinger, 155 N. Y. 201, 49 N. E. 760, 63 Am. St. Rep. 655; Becker *v.* Janinski, 15 N. Y. Suppl. 675, 27 Abb. N. Cas. 45; Boldt *v.* Murray, 2 N. Y. St. 232.

Ohio.— Gallaher *v.* Thompson, Wright 466; Bliss *v.* Long, Wright 351.

Oregon.— Williams *v.* Poppleton, 3 Oreg. 139.

Pennsylvania.— McCandless *v.* McWha, 22 Pa. St. 261; Haire *v.* Reese, 7 Phila. 138.

Texas.— Graham *v.* Gautier, 21 Tex. 111; Wilkins *v.* Ferrell, 10 Tex. Civ. App. 231, 30 S. W. 450.

England.— Lanphier *v.* Phipos, 8 C. & P. 475, 34 E. C. L. 844.

See 39 Cent. Dig. tit. "Physicians and Surgeons," § 23.

The implied contract of a physician treating a fractured limb is not to restore it in its natural perfectness, but to treat it with that degree of diligence and skill which is ordinarily possessed by the average of the members of the profession in similar localities, regard being had to the state of the medical profession at the time. Bigney *v.* Fisher, 26 R. I. 402, 59 Atl. 72. See also MacKenzie *v.* Carman, 103 N. Y. App. Div. 246, 92 N. Y. Suppl. 1063.

36. *Maine.*— Patten *v.* Wiggin, 51 Me. 594, 81 Am. Dec. 593.

Nebraska.— O'Hara *v.* Wells, 14 Nebr. 403, 15 N. W. 722.

Ohio.— Tish *v.* Welker, 5 Ohio S. & C. Pl. Dec. 725, 7 Ohio N. P. 472.

Oklahoma.— Champion *v.* Kieth, 17 Okla. 204, 87 Pac. 845.

Pennsylvania.— Tiedeman *v.* Lœwengrund, 2 Wkly. Notes Cas. 272.

See 39 Cent. Dig. tit. "Physicians and Surgeons," § 23.

37. Quinn *v.* Donovan, 85 Ill. 194 (holding that an instruction, in an action against a surgeon for mistreatment of a fracture, that

or is discharged by the patient;[38] and he is bound to use ordinary care and skill not only in his attendance, but in determining when it may be safely and properly discontinued.[39] But if the patient goes to the office of the physician, from whom he receives proper treatment, and then fails to return for further treatment, in consequence of which he suffers, he has no right of action against the physician.[40]

10. IN USING ANESTHETICS. Where a patient is put under the influence of an anesthetic, depriving him of the use of his faculties, physicians, surgeons, and dentists are required to use the highest professional skill and diligence to avoid every possible danger.[41] But they are only bound to look to natural and probable effects,[42] and are not answerable for results arising from the peculiar condition or temperament of a patient, of which they had no knowledge.[43]

11. IN GIVING INSTRUCTIONS. It is the duty of a physician or surgeon, in taking charge of a case, such as a broken limb, to give his patient all necessary and proper instructions as to what care and attention the patient should give the limb, in the absence of the physician, and the caution to be observed in the use of the limb before it is entirely healed,[44] and for failure to discharge his duty in this respect he may be liable in damages.[45]

12. TO AVOID COMMUNICATING CONTAGIOUS DISEASES. It is the duty of physicians who are attending patients afflicted with contagious diseases, when called to attend other patients, to take all such precautionary means as experience has proved to be necessary to prevent its communication to them.[46]

IV. LIABILITY FOR NEGLIGENCE OR MALPRACTICE.[47]

A. Practitioners Subject to Liability. A physician need not be qualified to practise in order to render himself liable for negligence or malpractice. If, by treating, operating on, or prescribing for physical ailments, a person holds himself out as a physician to persons employing him, and they believe him to be a physician, he will be chargeable as such.[48] But one who does not profess to be a physician, and volunteers to attend a sick person merely as an act of kindness, and without expectation of reward, incurs no liability, although his treatment of the case is improper.[49]

if defendant could have learned the nature of the injury, and applied the proper remedy, and failed to do so, he was liable, requires too great a degree of skill); Patten *v.* Wiggin, 51 Me. 594, 81 Am. Dec. 593; Graves *v.* Santway, 2 Silv. Sup. (N. Y.) 67, 6 N. Y. Suppl. 892 [*affirmed* in 127 N. Y. 677, 28 N. E. 256].

38. Williams *v.* Gilman, 71 Me. 21; Ballou *v.* Prescott, 64 Me. 305; Barbour *v.* Martin, 62 Me. 536; Dashiell *v.* Griffith, 84 Md. 363, 35 Atl. 1094; Gerken *v.* Plimpton, 62 N. Y. App. Div. 35, 70 N. Y. Suppl. 793; Boom *v.* Reed, 69 Hun (N. Y.) 426, 23 N. Y. Suppl. 421; Potter *v.* Virgil, 67 Barb. (N. Y.) 578; Gillette *v.* Tucker, 67 Ohio St. 106, 65 N. E. 865, 93 Am. St. Rep. 639.

When a physician engages to attend a patient without limitation of time, he can cease his visits only with the consent of the patient, or on giving the patient timely notice, or when the patient no longer requires medical treatment. Becker *v.* Janinski, 15 N. Y. Suppl. 675, 27 Abb. N. Cas. 45.

39. Mucci *v.* Houghton, 89 Iowa 608, 57 N. W. 305; Ballou *v.* Prescott, 64 Me. 305; Dashiell *v.* Griffith, 84 Md. 363, 35 Atl. 1094.

40. Dashiell *v.* Griffith, 84 Md. 363, 35 Atl. 1094.

41. Keily *v.* Colton, 1 N. Y. City Ct. 439.

42. Bogle *v.* Winslow, 5 Phila. (Pa.) 136.

43. Bogle *v.* Winslow, 5 Phila. (Pa.) 136.

44. Carpenter *v.* Blake, 60 Barb. (N. Y.) 488 [*reversed* on other grounds in 50 N. Y. 696]; Tish *v.* Welker, 5 Ohio S. & C. Pl. Dec. 725, 7 Ohio N. P. 472.

45. Beck *v.* German Klinik, 78 Iowa 696, 43 N. W. 617, 7 L. R. A. 566.

46. Piper *v.* Menifee, 12 B. Mon. (Ky.) 465, 54 Am. Dec. 547.

47. **Carrier not liable** for malpractice of physician employed by its servant to care for passenger see CARRIERS, 6 Cyc. 600 note 74.

48. Matthei *v.* Wooley, 69 Ill. App. 654; Musser *v.* Chase, 29 Ohio St. 577 (holding that an empiric is liable to a civil action for malpractice notwithstanding it is made a penal offense for such a person to practise medicine in any of its departments); Nelson *v.* Harrington, 72 Wis. 591, 40 N. W. 228, 7 Am. St. Rep. 900, 1 L. R. A. 719; Jones *v.* Fay, 4 F. & F. 525; Ruddock *v.* Lowe, 4 F. & F. 519.

49. Higgins *v.* McCabe, 126 Mass. 13, 30 Am. Rep. 642.

B. Acts or Omissions Constituting Negligence or Malpractice — 1. In General. It being the duty of a physician or surgeon to possess a reasonable degree of learning and skill, to exercise ordinary care and diligence, and to use his best judgment in all cases of doubt,[50] he will be liable for a failure to conform to the proper standard whereby injury results to a patient;[51] but mere lack of skill or negligence without injury gives no right to recover even nominal damages.[52] If a physician follows the established practice, and no gross error is shown, he is not liable for injuries caused by the treatment.[53] Nor is he liable for want of success.[54]

2. Refusal to Take Case. A physician, not being bound to render professional services to everyone who applies, is not liable for arbitrarily refusing to respond to a call, although he is the only physician available.[55]

3. Failure to Discover Nature of Injury or Ailment. A patient is entitled to an ordinarily careful and thorough examination, such as the circumstances, the condition of the patient, and the physician's opportunities for examination will permit.[56] If there is reasonable opportunity for examination, and the nature of the injury or ailment can be discovered by the exercise of ordinary care and diligence, then a physician is answerable for failure to make such discovery;[57] otherwise not.[58] So too it has been held that if a physician, by the exercise of reasonable care and skill, ought to discover that an ailment is incurable, that it will not yield to usual treatment, and that the patient will not be benefited, and fails to make such discovery and advise the patient thereof, he is guilty of negligence.[59]

4. Wrong Diagnosis. A wrong diagnosis of a case, resulting from a want of skill or care on the part of the physician, and followed by improper treatment, to the injury of the patient, renders the physician liable in damages;[60] and the fact that the same results would have ensued even without the improper treatment is immaterial on the question of the physician's liability.[61] But unless improper treatment follows, a wrong diagnosis gives no right of action.[62] The fact that information and not medical treatment was sought does not excuse negligence in making the diagnosis.[63] But a general practitioner will not be held liable for making a wrong diagnosis of a very rare disease, which can only be detected by a skilled expert.[64] Nor does a mere omission by a patient's attending physician to

50. See *supra*, III, B.

51. Barney *v.* Pinkham, 29 Nebr. 350, 45 N. W. 694, 26 Am. St. Rep. 389; McCracken *v.* Smathers, 122 N. C. 799, 29 S. E. 354; Wohlert *v.* Seibert, 23 Pa. Super. Ct. 213; Seare *v.* Prentice, 8 East 348; Rich *v.* Pierpont, 3 F. & F. 35. See also cases cited *supra*, III, B, 1, a.

52. Ewing *v.* Goode, 78 Fed. 442.

53. McKee *v.* Allen, 94 Ill. App. 147; Stern *v.* Lanng, 106 La. 738, 31 So. 303; Stevenson *v.* Gelsthorpe, 10 Mont. 563, 27 Pac. 404.

54. Champion *v.* Kieth, 17 Okla. 204, 87 Pac. 845. See also cases cited *supra*, III, B, 7.

55. Hurley *v.* Eddingfield, 156 Ind. 416, 59 N. E. 1058, 83 Am. St. Rep. 198, 53 L. R. A. 135.

56. Burk *v.* Foster, 114 Ky. 20, 69 S. W. 1096, 24 Ky. L. Rep. 791, 59 L. R. A. 277.

57. Manser *v.* Collins, 69 Kan. 290, 76 Pac. 851; Burk *v.* Foster, 114 Ky. 20, 69 S. W. 1096, 24 Ky. L. Rep. 791, 59 L. R. A. 277; Lewis *v.* Dwinell, 84 Me. 497, 24 Atl. 945.

58. Gedney *v.* Kingsley, 16 N. Y. Suppl. 792; Langford *v.* Jones, 18 Oreg. 307, 22 Pac. 1064.

The failure of a physician to discover that his patient's arm is dislocated is not negligence, where he made more than one careful examination of the injured arm, and called in another physician for consultation. James *v.* Crockett, 34 N. Brunsw. 540.

59. Logan *v.* Field, 75 Mo. App. 594.

60. Grainger *v.* Still, 187 Mo. 197, 85 S. W. 1114, 70 L. R. A. 49.

61. Grainger *v.* Still, 187 Mo. 197, 85 S. W. 1114, 70 L. R. A. 49.

62. Tomer *v.* Aiken, 126 Iowa 114, 101 N. W. 769.

A physician or surgeon is not chargeable for ignorance of a case, if he prescribes for it rightly. Fowler *v.* Sergeant, 1 Grant (Pa.) 355.

63. Harriott *v.* Plimpton, 166 Mass. 585, 44 N. E. 992.

64. Wohlert *v.* Seibert, 23 Pa. Super. Ct. 213, holding that a physician who is merely a general practitioner cannot be held liable in damages to a patient for diagnosing and treating a disease of the eye as conjunctivitis, when it was in fact glaucoma, where the evidence shows that glaucoma is a very rare disease; that it is incurable in character; that its certain diagnosis could be made only by the skilled expert, of special training, skill, and experience; that it should be treated with remedies and appliances which are never expected to be within the reach of the general practitioner of medicine; that its promi-

use ordinary skill in diagnosing his disease before reporting it to the board of health as a case of smallpox give a right of action.[65]

5. Failure to Follow Established Practice.[66] It has been broadly stated that any deviation from the established mode of practice is sufficient to charge a physician with liability in case of any injury arising to the patient.[67] When a particular mode of treatment is upheld by a consensus of opinion of the members of the profession, it should be followed by the ordinary practitioner; and if a physician sees fit to experiment with some other mode he does so at his own peril.[68] If, however, the character of the injury or disease is such that the patient cannot endure the most approved method of treatment in such cases, then a failure to resort to such treatment does not show a want of skill or negligence.[69] When the treatment adopted is not in accordance with established practice, but is positively injurious, the case is not one of negligence, but of want of skill.[70]

6. Abandonment or Neglect of Case — a. Unwarranted Abandonment. The unwarranted abandonment of a case at a critical period, resulting in increased pain and suffering on the part of the patient, will render the physician liable in damages.[71]

b. Failure to Attend With Sufficient Frequency. A physician is not chargeable with neglect on account of the intervals elapsing between his visits, where the injury requires no attention during the intervals; but is negligent where attention is required.[72]

c. Temporarily Leaving Practice. A physician has a right to leave temporarily his practice if he makes provision for the attendance of a competent physician upon his patients.[73] If he notifies a patient that he is going away, and indicates who will attend him in his stead, no neglect can be imputed to him.[74] But a physician who leaves a patient in a critical stage of the disease, without reason, or sufficient notice to enable the party to procure another medical attendant, is guilty of a culpable dereliction of duty, and is liable therefor.[75]

7. Performing Operation Without Consent — a. Of Patient. Where a patient

nent symptoms were so nearly identical with those of conjunctivitis that the diagnosis made by defendant was one reasonably to be expected from a general practitioner; and that the treatment given was not found faulty by any general practitioner or expert who testified in the case.

65. Brown *v.* Purdy, 54 N. Y. Super. Ct. 109.

66. See also *supra*, III, B, 2.

67. Patten *v.* Wiggin, 51 Me. 594, 81 Am. Dec. 593; Pike *v.* Honsinger, 155 N. Y. 201, 49 N. E. 760, 63 Am. St. Rep. 655.

Advice in immaterial matter.—In an action against a surgeon for damages caused by his unskilfulness or negligence in reducing a fracture of plaintiff's arm, the fact that defendant advised bathing the parts with a decoction of wormwood and vinegar, which the expert testimony condemned, was not such a departure from approved medical treatment as to entitle plaintiff to recover. Winner *v.* Lathrop, 67 Hun (N. Y.) 511, 22 N. Y. Suppl. 516.

Evidence held insufficient to show deviation from christian science treatment see Spead *v.* Tomlinson, 73 N. H. 46, 59 Atl. 376, 68 L. R. A. 432.

68. Jackson *v.* Burnham, 20 Colo. 532, 39 Pac. 577; Hesse *v.* Knippel, 1 Mich. N. P. 109; Slater *v.* Baker, 2 Wils. C. P. 359.

69. Hallam *v.* Means, 82 Ill. 379, 25 Am. Rep. 328.

70. Carpenter *v.* Blake, 60 Barb. (N. Y.) 488 [*reversed* on other grounds in 50 N. Y. 696].

71. Lathrope *v.* Flood, (Cal. 1901) 63 Pac. 1007.

72. Tomer *v.* Aiken, 126 Iowa 114, 101 N. W. 769.

Whether a physician is negligent in permitting certain intervals to elapse between his calls on his patient depends on the custom, in similar localities, in the treatment of similar cases, and not upon the custom of any particular physician in his own practice. Tomer *v.* Aiken, 126 Iowa 114, 101 N. W. 769.

The fact that one of two physicians employed to attend an injured person was negligent in not attending his patient with sufficient frequency is immaterial on the liability of the other, who was discharged from attending after his first call. Tomer *v.* Aiken, 126 Iowa 114, 101 N. W. 769.

73. Ewing *v.* Goode, 78 Fed. 442.

74. Becker *v.* Janinski, 15 N. Y. Suppl. 675, 27 Abb. N. Cas. 45.

Where a physician remains away longer than he had notified the patient, and injury results from the lack of treatment during that time, the physician is liable for malpractice. Gerken *v.* Plimpton, 62 N. Y. App. Div. 35, 70 N. Y. Suppl. 793.

75. Barbour *v.* Martin, 62 Me. 536, Danforth, J., delivering the opinion of the court.

is in possession of his faculties and in such physical health as to be able to consult about his condition, and where no emergency exists making it impracticable to confer with him, his consent is a prerequisite to a surgical operation by his physician.[76] If, however, a patient voluntarily submits to an operation, his consent will be presumed, unless he was the victim of false and fraudulent misrepresentations.[77] Where an emergency arises calling for immediate action for the preservation of the life or health of the patient, and it is impracticable to obtain his consent or the consent of any one authorized to speak for him, it is the duty of the physician to perform such operation as good surgery demands, without such consent.[78] And again if, in the course of an operation to which the patient consented, the physician discovers conditions not anticipated before the operation was commenced, and which, if not removed, would endanger the life of the patient, he will, although no express consent be obtained or given, be justified in extending the operation to remove and overcome them.[79]

b. Of Husband or Father. Whether or not the consent of the husband or father to the performance of an operation upon a married woman or child is necessary is not well settled. One case holds that surgeons are justified in performing an operation upon a married woman with her consent, when they deem it necessary, whether her husband consents or not.[80] Other cases, apparently assuming that the husband's consent is necessary, hold that, by placing his wife under the care of a surgeon for treatment, a husband impliedly consents to such operations as may be found necessary or expedient.[81] A father's consent to the performance of an operation upon a child seventeen years of age has been held unnecessary.[82]

8. Failure to Give Instructions. Although a physician may have exercised a proper degree of skill and care in his treatment of a case, still if he fails to give the patient or his attendants proper instructions as to the care and attention best calculated to effect a cure, he is guilty of negligence for which he may be held liable.[83]

9. Communicating Contagious Disease. A physician who, knowing that he has an infectious disease, continues to visit a patient without apprising him of the fact and without proper precautions on his own part, and communicates to him this disease, is responsible for the consequent damage, including as well the suffering, danger, and loss of time, as the expense necessarily occasioned by the

76. Pratt *v.* Davis, 224 Ill. 300, 79 N. E. 562, 7 L. R. A. N. S. 609 [*affirming* 118 Ill. App. 161]; Mohr *v.* Williams, 95 Minn. 261, 104 N. W. 12, 111 Am. St. Rep. 462, 1 L. R. A. N. S. 439.

77. State *v.* Housekeeper, 70 Md. 162, 16 Atl. 382, 14 Am. St. Rep. 340, 2 L. R. A. 587; McClallen *v.* Adams, 19 Pick. (Mass.) 333, 31 Am. Dec. 140.

Consent presumed.— In an English case it has even been held that consent will be presumed notwithstanding the fact of a direct prohibition to perform the operation under certain circumstances. Beatty *v.* Cullingworth, 44 Cent. L. J. 153.

78. Pratt *v.* Davis, 224 Ill. 300, 79 N. E. 562, 7 L. R. A. N. S. 609 [*affirming* 118 Ill. App. 161]; Short's Succession, 45 La. Ann. 1485, 14 So. 184; Mohr *v.* Williams, 95 Minn. 261, 104 N. W. 12, 111 Am. St. Rep. 462, 1 L. R. A. N. S. 439. See 4 Mich. L. Rev. 49–51.

79. Mohr *v.* Williams, 95 Minn. 261, 104 N. W. 12, 111 Am. St. Rep. 462, 1 L. R. A. N. S. 439.

A surgeon who undertakes to perform a minor operation on a patient is justified in performing a major operation, without the consent of the person operated upon, should such major operation be necessary to save the life of the patient. Parnell *v.* Springle, 5 Rev. de Jur. 74.

80. State *v.* Housekeeper, 70 Md. 162, 16 Atl. 382, 14 Am. St. Rep. 340, 2 L. R. A. 587, holding that a husband has no power to withhold from his wife the medical assistance which her case may require.

81. McClallen *v.* Adams, 19 Pick. (Mass.) 333, 31 Am. Dec. 140.

Authority given by a husband to perform one operation upon his wife will not confer any authority to perform a second. Pratt *v.* Davis, 224 Ill. 300, 79 N. E. 562, 7 L. R. A. N. S. 609 [*affirming* 118 Ill. App. 161], Scott C. J., delivering the opinion of the court.

82. Bakker *v.* Welsh, 144 Mich. 632, 108 N. W. 94, 7 L. R. A. N. S. 612. See 5 Mich. L. Rev. 40, 41.

83. Beck *v.* German Klinik, 78 Iowa 696, 43 N. W. 617, 7 L. R. A. 506; Carpenter *v.* Blake, 75 N. Y. 12; Carpenter *v.* Blake, 60 Barb. (N. Y.) 488 [*reversed* on other grounds in 50 N. Y. 696]. See also cases cited *supra*, III, B, 11.

second disease, thus produced by his own wrongful act.[84] So also where a surgeon, while in attendance on a patient, directs the latter's wife to assist in dressing a wound, knowing that there was danger of infection, but negligently assuring her that there was no such danger, and she relies on his advice, and becomes infected with poison, the surgeon is liable.[85]

10. **Intrusion of Unprofessional Assistant.** Where a physician takes an unprofessional, unmarried man with him to attend a confinement case, when there was no emergency, both are liable in damages to the woman.[86]

11. **Mistake in Prescription.** Where a physician, by a *lapsus calami*, makes a mistake in a prescription, as the result of which the patient dies, the fact that the druggist who fills the prescription is also negligent is no defense in an action against the physician for malpractice.[87] But a physician is not liable for the druggist's negligence in putting up a prescription properly written by the physician.[88]

12. **Malpractice Resulting in Death.** A physician is liable for malpractice resulting in death, if it was the proximate cause thereof.[89] But if death was caused by a disease not resulting from a surgical operation in question the surgeon is not liable.[90]

13. **Errors of Judgment.** A physician entitled to practise his profession, possessing the requisite qualifications, and applying his skill and judgment with due care, is not ordinarily liable for damages consequent upon an honest mistake or an error of judgment in making a diagnosis, in prescribing treatment, or in determining upon an operation, where there is reasonable doubt as to the nature of the physical conditions involved, or as to what should have been done in accordance with recognized authority and good current practice.[91] Whether errors of judgment will or will not make a physician liable in a given case depends not merely upon the fact that he may be ordinarily skilful as such, but whether he has treated the case skilfully or has exercised in its treatment such reasonable skill and diligence as is ordinarily exercised in his profession.[92] There is a fundamental difference in malpractice cases between mere errors of judgment and negligence

84. Piper *v.* Menifee, 12 B. Mon. (Ky.) 465, 54 Am. Dec. 547, by way of argument.

85. Edwards *v.* Lamb, 69 N. H. 599, 45 Atl. 480, 50 L. R. A. 160, holding that where plaintiff, under the direction of defendant, a surgeon, assisted in dressing a wound of her husband, and became infected with poison by reason of slight scratches on her fingers, defendant, knowing the danger, was guilty of negligence in assuring her there was none, since he was not justified in assuming that her hands were free from such wounds.

86. De May *v.* Roberts, 46 Mich. 160, 9 N. W. 146, 41 Am. Rep. 154, holding further that it makes no difference that the patient or her husband supposed at the time that the intruder was a medical man, and therefore submitted without objection to his presence.

87. Murdock *v.* Walker, 43 Ill. App. 590.

88. Stretton *v.* Holmes, 19 Ont. 286.

89. Braunberger *v.* Cleis, 13 Am. L. Reg. (Pa.) 587.

90. State *v.* Housekeeper, 70 Md. 162, 16 Atl. 382, 14 Am. St. Rep. 340, 2 L. R. A. 587.

91. *Illinois.*— McKee *v.* Allen, 94 Ill. App. 147.

Kansas.— Tefft *v.* Wilcox, 6 Kan. 46.

Minnesota.— Staloch *v.* Holm, 100 Minn. 276, 111 N. W. 264, 9 L. R. A. N. S. 712.

Missouri.— Vanhooser *v.* Berghoff, 90 Mo. 487, 3 S. W. 72.

New York.— Becker *v.* Janinski, 15 N. Y. Suppl. 675, 27 Abb. N. Cas. 45; Wells *v.* World's Dispensary Medical Assoc., 9 N. Y. St. 452.

Oregon.— Heath *v.* Glisan, 3 Oreg. 64.

Texas.— Graham *v.* Gautier, 21 Tex. 111; Wilkins *v.* Ferrell, 10 Tex. Civ. App. 231, 30 S. W. 450.

West Virginia.— Dye *v.* Corbin, 59 W. Va. 266, 53 S. E. 147.

See 39 Cent. Dig. tit. "Physicians and Surgeons," § 32.

The reasons for excepting malpractice cases from the rule that the exercise of defendant's best judgment is no defense to an action for negligence are to be found in the character of emergencies physicians meet which often preclude deliberation; in the nature of their undertaking which contracts for individual judgment and skill; in the peculiarity of the human constitution, which presents difficulties not arising from insensate matter; in the nature of medical science, which is based on progressive knowledge; and in the inherent uncertainty of the expert testimony involved. Staloch *v.* Holm, 100 Minn. 276, 111 N. W. 264, 9 L. R. A. N. S. 712.

92. West *v.* Martin, 31 Mo. 375, 80 Am. Dec. 107.

in previously collecting data essential to a proper conclusion, or in subsequent conduct in the selection and use of instrumentalities with which the physician may execute his judgment. If he omits to inform himself as to the facts and circumstances, and injury results therefrom, then he is liable.[93]

14. FRAUD AND DECEIT.[94] It is the duty of a physician to act with the utmost good faith toward his patient, and if he knows that he cannot accomplish a cure, or that the treatment adopted will probably be of no benefit, it is his duty to advise his patient of these facts, and if he fails to do so he is guilty of a breach of duty.[95] But to recover on account of deceit based on his statement that he could and would cure plaintiff, the latter must not only prove that the representation was false, but also that it was made with a fraudulent intent.[96]

15. WRONGFUL CERTIFICATE OF INSANITY.[97] Without statutory provisions to that effect, a civil action for damages against a physician for certifying to a person's insanity cannot be based on the insufficiency of the methods which he pursued in reaching and certifying a correct conclusion.[98] In an action against a physician for falsely certifying, through malice or negligence, to the insanity of plaintiff, the falsehood, and not the insufficiency of the certificate, is the ground of action against defendant.[99] Therefore a physician who signs a certificate of insanity which is false, without exercising ordinary care and prudence in making his examination, and without making due inquiry into the question of sanity, is liable to an action for damages.[1] Nor is he the less liable for the want of such due care and inquiry because he has acted *bona fide*.[2] But a physician who signs a certificate of insanity when the patient is sane is not liable therefor where the certificate was signed after making an examination, and the mistake was due merely to an error of judgment, provided the physician brings to the case the learning, care, and diligence required by law.[3] In such an action the burden is on plaintiff to show negligence,[4] and also to show that at the time the certificate of insanity was given he was in fact sane.[5] Defendant may show under what circumstances and on what information he acted in making such certificate.[6] If such evidence does not go to the extent of a justification in case the certificate is found to be false, it is proper evidence to be considered in awarding damages.[7]

16. EFFECT OF CONTRIBUTORY NEGLIGENCE. It is the duty of a patient to coöperate with his physician and conform to the necessary prescriptions and treatment, and follow all reasonable instructions given.[8] Therefore it is a good defense to

For there may be responsibility where there is no neglect if the error of judgment is so gross as to be inconsistent with the use of that degree of skill that it is the duty of every physician to bring to the treatment of a case. McKee *v.* Allen, 94 Ill. App. 147; West *v.* Martin, 31 Mo. 375, 80 Am. Dec. 107; Becker *v.* Janinski, 15 N. Y. Suppl. 675, 27 Abb. N. Cas. 45; Dye *v.* Corbin, 59 W. Va. 266, 53 S. E. 147.

93. Staloch *v.* Holm, 100 Minn. 276, 111 N. W. 264, 9 L. R. A. N. S. 712; Johnson *v.* Winston, 68 Nebr. 425, 94 N. W. 607.

94. Action of deceit generally see 20 Cyc. 1.

95. Logan *v.* Field, 75 Mo. App. 594.

For example, where a physician in charge of a sanitarium represents to an invalid, without knowing the truth or falsity of the representation, that if the latter will take treatment at the sanitarium he can be cured, and the invalid relies thereon, and enters the sanitarium, but is not cured, the physician is liable in an action for deceit. Hedin *v.* Minneapolis Medical, etc., Inst., 62 Minn. 146, 64 N. W. 158, 54 Am. St. Rep. 628, 35 L. R. A. 417.

96. Hedin *v.* Minneapolis Medical, etc., Inst., 62 Minn. 146, 64 N. W. 158, 54 Am. St. Rep. 628, 35 L. R. A. 417; Spead *v.* Tomlinson, 73 N. H. 46, 59 Atl. 376, 68 L. R. A. 432.

97. Examination of insane persons in general see INSANE PERSONS, 22 Cyc. 1123 *et seq.*

98. Pennell *v.* Cummings, 75 Me. 163.

99. Pennell *v.* Cummings, 75 Me. 163.

1. Ayers *v.* Russell, 50 Hun (N. Y.) 282, 3 N. Y. Suppl. 338; Hall *v.* Semple, 3 F. & F. 337.

2. Hall *v.* Semple, 3 F. & F. 337.

3. Williams *v.* Le Bar, 141 Pa. St. 149, 21 Atl. 525; Hall *v.* Semple, 3 F. & F. 337.

4. Williams *v.* Le Bar, 141 Pa. St. 149, 21 Atl. 525.

5. Pennell *v.* Cummings, 75 Me. 163.

6. Pennell *v.* Cummings, 75 Me. 163.

7. Pennell *v.* Cummings, 75 Me. 163.

8. Haering *v.* Spicer, 92 Ill. App. 449; Tish *v.* Welker, 5 Ohio S. & C. Pl. Dec. 725, 7 Ohio N. P. 472; McCandless *v.* McWha, 22 Pa. St. 261; Haire *v.* Reese, 7 Phila. (Pa.) 138; Lawson *v.* Conaway, 37 W. Va. 159, 16

an action for malpractice, where the physician or surgeon is charged with negligence or the non-observance of proper care or the want of skill in performing the services undertaken, that the patient was guilty of negligence at the time which conduced or contributed to produce the injury complained of;[9] but it will not suffice to defeat the action that the patient was subsequently negligent, and thereby conduced to the aggravation of the injury primarily sustained at the hands of the physician or surgeon, and such conduct on the part of the patient is pertinent only in mitigation of damages.[10]

S. E. 564, 38 Am. St. Rep. 17, 18 L. R. A. 627.

9. *Illinois.*— Haering *v.* Spicer, 92 Ill. App. 449.

Indiana.— Lower *v.* Franks, 115 Ind. 334, 17 N. E. 630; Gramm *v.* Boener, 56 Ind. 497; Young *v.* Mason, 8 Ind. App. 264, 35 N. E. 521.

Massachusetts.— Hibbard *v.* Thompson, 109 Mass. 286, where it is said that a patient cannot recover, either in contract or in tort, for injuries consequent upon unskilful or negligent treatment by his physician, if his own negligence directly contributed to them to an extent which cannot be distinguished and separated.

Michigan.— Hitchcock *v.* Burgett, 38 Mich. 501.

Minnesota.—Chamberlain *v.* Porter, 9 Minn 260.

Missouri.— West *v.* Martin, 31 Mo. 375, 80 Am. Dec. 107.

New York.— Becker *v.* Janinski, 15 N. Y. Suppl. 675, 27 Abb. N. Cas. 45.

Ohio.— Geiselman *v.* Scott, 25 Ohio St. 86.

Oregon.— Beadle *v.* Paine, 46 Oreg. 424, 80 Pac. 903.

Pennsylvania.— Richards *v.* Willard, 176 Pa. St. 181, 35 Atl. 114; Potter *v.* Warner, 91 Pa. St. 362, 36 Am. Rep. 668; McCandless *v.* McWha, 22 Pa. St. 261; Haire *v.* Reese, 7 Phila. 138.

See 39 Cent. Dig. tit. "Physicians and Surgeons," § 33.

Failure to return to physician.— In an action for malpractice, an instruction that, if plaintiff was told by defendant to visit him again as soon as he felt any pain, and, although feeling pain for a week, he neglected to call, he was guilty of contributory negligence preventing recovery was correct. Jones *v.* Angell, 95 Ind. 376.

Refusal to permit proper treatment.— Where a patient is delirious, and the members of his family having him in charge refuse to allow the proposed treatment, the physician or surgeon will not be required to use force, and will not be liable for any injury to limb or health resulting from a failure to use the proposed treatment. Littlejohn *v.* Arbogast, 95 Ill. App. 605. Where a surgeon is prevented from reducing a dislocation by the refusal of his patient to submit to the operation, the surgeon cannot be held liable for damages resulting therefrom. Littlejohn *v.* Arbogast, *supra*.

Operation performed at instance of patient.— If a surgeon, when called on, advises the patient, who is of mature years and of sound mind, that the proposed operation is unnecessary and improper, and the patient still insists on its performance, and the surgeon thereupon performs it, he cannot be held responsible to the patient for damages, on the ground that the operation was improper and injurious, as in such case the patient relies on his own judgment, and not on that of the surgeon, as to the propriety of the operation; and he cannot complain of an operation performed at his own instance and on his own judgment. Gramm *v.* Boener, 56 Ind. 497.

Information given to patient must be considered.— The information given by a surgeon to his patient concerning the nature of his malady is a circumstance that should be considered in determining whether the patient, in disobeying the instructions of the surgeon, was guilty of contributory negligence or not. Geiselman *v.* Scott, 25 Ohio St. 86.

"Directly" contributed proper.— In an action for malpractice, an instruction requiring the jury to find that plaintiff's own negligence directly contributed to the injury, before they could on that ground find for defendant, is not erroneous for using the word "directly," instead of "proximately." Davis *v.* Spicer, 27 Mo. App. 279.

10. *Illinois.*— Morris *v.* Despain, 104 Ill. App. 452.

Missouri.— Sanderson *v.* Holland, 39 Mo. App. 233.

New York.— Du Bois *v.* Decker, 130 N. Y. 325, 29 N. E. 313, 27 Am. St. Rep. 529, 14 L. R. A. 429 [*affirming* 4 N. Y. Suppl. 768]; Carpenter *v.* Blake, 75 N. Y. 12.

North Carolina.— McCracken *v.* Smathers, 122 N. C. 709, 29 S. E. 354.

Oregon.— Beadle *v.* Paine, 46 Oreg. 424, 80 Pac. 903.

Pennsylvania.— Fowler *v.* Sergeant, 1 Grant 355.

Vermont.— Wilmot *v.* Howard, 39 Vt. 447, 94 Am. Dec. 338.

West Virginia.— Lawson *v.* Conaway, 37 W. Va. 159, 16 S. E. 564, 38 Am. St. Rep. 17, 18 L. R. A. 627.

See 39 Cent. Dig. tit. "Physicians and Surgeons," § 33.

The natural temperament or weakness of a patient contributing to produce the injury primarily caused by the unskilful treatment of a physician is no bar to an action against such physician for malpractice, but may be shown in mitigation of damages. Mullin *v.* Flanders, 73 Vt. 95, 50 Atl. 813.

17. Effect of Admission of Want of Sufficient Skill. If a practitioner frankly informs a patient of his want of skill, or the patient is in some other way fully aware of it, the latter cannot complain of the lack of that which he knew did not exist.[11]

C. To Whom Liable — Gratuitous or Charity Patient. A physician may decline to respond to the call of a patient unable to compensate him; but, if he undertakes the treatment of such a patient, his liabilities for negligence or malpractice are the same as in the case of any other patient.[12] So a physician employed by a city to treat patients at the city almshouse is liable to one of such patients who is injured through the physician's negligence, although there is no contractual relation between such patient and the physician.[13]

D. For Whose Acts or Omissions Physician Liable — 1. Assistant. A physician is responsible for an injury done to a patient through the want of proper skill and care in his apprentice or assistant.[14]

2. Substitute. If a family physician or railway surgeon, on leaving town, recommends, in case of need, some other physician, who is not, however, in any sense in his employment, it does not make him liable for injuries resulting from the latter's want of skill.[15]

3. Partner. Partners in the practice of medicine are all liable for an injury to a patient resulting from the negligence, either of omission or commission, of any one of the partners, within the scope of their partnership business; but, for an injury resulting from the act of one partner outside of the common business, the offending partner is alone responsible.[16]

4. Nurse or Attendant. Physicians are not as a rule liable for the negligence of hospital nurses or attendants of which they are not personally cognizant.[17]

E. Actions For Negligence or Malpractice — 1. Nature and Form of Remedy. Where a physician or surgeon is employed to treat a patient without any express contract defining the character and extent of his duty and undertaking, either an action in contract or in tort may be maintained for the breach of the implied obligation arising from such employment caused by unskilful, negligent, and improper treatment.[18] When the action is in tort, case is the proper form of action,[19] and, although an operation is performed with malice, the

11. Lorenz *v.* Jackson, 88 Hun (N. Y.) 200, 34 N. Y. Suppl. 652; Shearman & R. Negl. § 607.

12. Becker *v.* Janinski, 15 N. Y. Suppl. 675, 27 Abb. N. Cas. 45. See also cases cited *supra*, III, B, 6.

13. Du Bois *v.* Decker, 130 N. Y. 325, 29 N. E. 313, 27 Am. St. Rep. 529, 14 L. R. A. 429 [*affirming* 4 N. Y. Suppl. 768].

14. Hancke *v.* Hooper, 7 C. & P. 81, 32 E. C. L. 510.

The surgeon and the assistant are jointly and individually liable for unskilful or negligent services of the assistant. Tish *v.* Welker, 5 Ohio S. & C. Pl. Dec. 725, 7 Ohio N. P. 472.

15. Keller *v.* Lewis, 65 Ark. 578, 47 S. W. 755; Hitchcock *v.* Burgett, 38 Mich. 501; Myers *v.* Holborn, 58 N. J. L. 193, 33 Atl. 389, 55 Am. St. Rep. 606, 30 L. R. A. 345.

16. Whittaker *v.* Collins, 34 Minn. 299, 25 N. W. 632; Hyrne *v.* Erwin, 23 S. C. 226, 55 Am. Rep. 15, holding that in an action against a firm of doctors for malpractice, it is not error to instruct that partners in the practice of medicine are "sureties" for the faithful performance of their engagements by each of them. See Haase *v.* Morton, (Iowa 1908) 115 N. W. 921, where one partner was held liable for the negligence of another partner in superintending the return of a patient from the operating room of a hospital to her apartment. See also 6 Mich. L. Rev. 683–686.

17. Perionowsky *v.* Freeman, 4 F. & F. 977. But see Stanley *v.* Schumpert, 117 La. 255, 41 So. 565, 116 Am. St. Rep. 202, 6 L. R. A. N. S. 306, holding that where an attendant at a sanitarium was not sufficiently careful and did not follow the prescriptions of the physicians, and the physicians did not see to it to some extent at least that the medicines prescribed were properly administered, and to an extent neglected the patient, they are liable for resulting injuries.

18. Kuhn *v.* Brownfield, 34 W. Va. 252, 12 S. E. 519, 11 L. R. A. 700. *Compare* Tucker *v.* Gillette, 22 Ohio Cir. Ct. 664, 12 Ohio Cir. Dec. 401; McCrory *v.* Skinner, 2 Ohio Dec. (Reprint) 268, 2 West. L. Month. 203.

Waiver of tort.— In an action against a physician for malpractice, plaintiff may elect to sue on contract and thus waive the tort. Lane *v.* Boicourt, 128 Ind. 420, 27 N. E. 1111, 25 Am. St. Rep. 442; Goble *v.* Dillon, 86 Ind. 327, 44 Am. Rep. 308.

19. Cadwell *v.* Farrell, 28 Ill. 438; Mullin *v.* Flanders, 73 Vt. 95, 50 Atl. 813.

Case see Case, Action on, 6 Cyc. 681.

patient having consented thereto, no recovery in trespass can be had therefor.[20] Where an express promise on the part of the physician is alleged and counted upon, the action is in contract, and not in tort.[21]

2. Time to Sue and Limitations. The particular statute of limitation applicable in actions for malpractice depends upon whether the action is in contract or in tort.[22] As the gist of an action to recover damages for unskilful treatment is the negligence of the surgeon, the statute begins to run from the time of the alleged negligence.[23] In some jurisdictions limitation of one year is expressly provided by statute in malpractice cases,[24] to run from the date of the termination of the professional services.[25]

3. Survival of Action. At common law an action for an injury to the person caused by the want of skill or negligence of a physician or surgeon does not survive the death of either party.[26] In many states, however, statutes provide for the survival of the action in such cases.[27]

4. Defenses.[28] A medical practitioner may perhaps protect himself from liability for malpractice by a special contract that he shall not be so liable.[29] Consent of the patient to the abandonment of the case by a physician may be a defense to a subsequent action for malpractice,[30] if such consent was not obtained by false representations.[31] It is no defense to a suit for malpractice that defendant was practising in violation of a statute making it an offense to practise physic without certain preliminary qualifications,[32] unless perhaps where the patient knew, when employing the physician, that he had not the qualifications.[33] Nor can a physician not belonging to one of the regular schools of medicine, such as a clairvoyant, relieve himself from liability by the contention that the patient was negligent in employing him with full knowledge of his methods of diagnosis and prescription.[34]

20. Cadwell *v.* Farrell, 28 Ill. 438.

21. Burns *v.* Barenfield, 84 Ind. 43.

22. See Limitations of Actions, 25 Cyc. 1032, 1047.

Indiana.— If the complaint is on contract, the statutory limitation of six years applies. Burns *v.* Barenfield, 84 Ind. 43; Staley *v.* Jameson, 46 Ind. 159, 15 Am. Rep. 285.

23. See Limitations of Actions, 25 Cyc. 1116 note 67. But see Gillette *v.* Tucker, 67 Ohio St. 106, 65 N. E. 865, 93 Am. St. Rep. 639 [*affirming* on equal division of the court 22 Ohio Cir. Ct. 664, 12 Ohio Cir. Dec. 401], holding that since want of skill or negligence on the part of a physician gives rise to no cause of action unless injurious consequences follow, a cause of action accrues when injury occurs.

If the injuries blend and extend over the whole period the physician has charge of the case, the right of action, it seems, becomes complete when the physician gives up the case without performing his duty, and limitations begin to run at this time. Gillette *v.* Tucker, 67 Ohio St. 106, 65 N. E. 865, 93 Am. St. Rep. 639 [*affirming* on equal division of the court 22 Ohio Cir. Ct. 664, 12 Ohio Cir. Dec. 401].

24. Tucker *v.* Gillette, 22 Ohio Cir. Ct. 664, 12 Ohio Cir. Dec. 401 [*affirmed* in 67 Ohio St. 106, 65 N. E. 865, 93 Am. St. Rep. 639]; Tucker *v.* Gillette, 11 Ohio S. & C. Pl. Dec. 226, 8 Ohio N. P. 389.

25. Miller *v.* Ryerson, 22 Ont. 369; Town *v.* Archer, 4 Ont. L. Rep. 383.

26. See Abatement and Revival, 1 Cyc. 62 text and note 20. See also McCrory *v.* Skinner, 2 Ohio Dec. (Reprint) 268, 2 West. L. Month. 203; Kuhn *v.* Brownfield, 34 W. Va. 252, 12 S. E. 519, 11 L. R. A. 700.

It is immaterial whether the action is in form *ex contractu* or *ex delicto*; in either case the injury is to the person and not to the estate of the patient. Boor *v.* Lowrey, 103 Ind. 468, 3 N. E. 151, 53 Am. Rep. 519; Jenkins *v.* French, 58 N. H. 532; Vittum *v.* Gilman, 48 N. H. 416; Best *v.* Vedder, 58 How. Pr. (N. Y.) 187.

27. Long *v.* Morrison, 14 Ind. 595, 77 Am. Dec. 72; Norris *v.* Grove, 100 Mich. 256, 58 N. W. 1006.

Continuing action once commenced.— N. H. St. (1844) c. 139, providing that all actions in which the right of action does not now by law survive the death of either party, which have been commenced in any court, may be prosecuted to final judgment at the election of "the surviving or legal representative of the deceased party," authorizes plaintiff to proceed with an action for malpractice on the death of defendant pending the action. Bedel *v.* Flanders, 51 N. H. 73 note.

28. **Contributory negligence** as a defense see *supra*, IV, B, 16.

29. Nelson *v.* Harrington, 72 Wis. 591, 40 N. W. 228, 7 Am. St. Rep. 900, 1 L. R. A. 719.

30. Carpenter *v.* Blake, 60 Barb. (N. Y.) 488 [*reversed* on other grounds in 50 N. Y. 696].

31. Carpenter *v.* Blake, 60 Barb. (N. Y.) 488 [*reversed* on other grounds in 50 N. Y. 696].

32. Musser *v.* Chase, 29 Ohio St. 577.

33. Musser *v.* Chase, 29 Ohio St. 577.

34. Nelson *v.* Harrington, 72 Wis. 591, 40

5. Pleading[35] — a. In General. It is ordinarily sufficient for plaintiff, in an action for malpractice, to aver that defendant was a physician and surgeon; that plaintiff retained and employed him as such to attend upon him; that he accepted and entered upon such employment, yet conducted himself in an unskilful and negligent manner, whereby plaintiff was injured, to his damage, etc.[36] Want of skill and care on the part of the physician must be alleged,[37] and also the specific acts of commission or omission concerning which negligence is imputed.[38] It is not necessary to aver expressly that it was the physician's duty to act skilfully,[39] or that any consideration was to be paid for the services rendered,[40] since these facts will be implied from the employment. Since an action for malpractice is founded on contract, although sounding in tort, it is unnecessary for the complaint to aver expressly that there was no negligence on the part of plaintiff.[41] To a complaint for malpractice, sounding in tort against two surgeons, an answer that each was separately employed is bad.[42]

b. Amendment. A plaintiff in an action to recover damages for malpractice by a physician may be allowed to amend his complaint to correspond with the proof.[43]

6. Issues and Proof. Plaintiff in an action for malpractice must recover, if at all, in accordance with his allegations; the evidence must be restricted within the issues as made by the pleadings.[44] Where the language of a complaint implies no more than the duty imposed by law to exercise reasonable skill and care, evi-

N. W. 228, 7 Am. St. Rep. 900, 1 L. R. A. 719.

35. Pleading generally see Pleading.

36. Hanselman *v.* Carstens, 60 Mich. 187, 27 N. W. 18; Morrill *v.* Tegarden, 19 Nebr. 534, 26 N. W. 202; Crowty *v.* Stewart, 95 Wis. 490, 70 N. W. 558; Jones *v.* Burtis, 88 Wis. 478, 60 N. W. 785. See also Lane *v.* Boicourt, 128 Ind. 420, 27 N. E. 1111, 25 Am. St. Rep. 442; Burns *v.* Barenfield, 84 Ind. 43.

Allegation of professional character of defendant.— A petition for malpractice, alleging that defendant "is a physician . . . engaged in the practice of medicine . . . and has been so engaged for several years last past" is sufficient, without alleging that he was a physician when he treated his patient. Bower *v.* Self, 68 Kan. 825, 75 Pac. 1021.

37. Barney *v.* Pinkham, 29 Nebr. 350, 45 N. W. 694, 26 Am. St. Rep. 389.

38. De Hart *v.* Etnire, 121 Ind. 242, 23 N. E. 77 (holding, however, that in an action for malpractice, a complaint is not demurrable for failure of plaintiff to set forth in what particular defendant was negligent in the performance of his duties as physician and surgeon, as the remedy for uncertainty is by motion to make more specific); Hawley *v.* Williams, 90 Ind. 160.

Allegations held sufficient see Grannis *v.* Branden, 5 Day (Conn.) 260, 5 Am. Dec. 143; Carpenter *v.* McDavitt, 53 Mo. App. 393; Brown *v.* Cady, 91 N. Y. App. Div. 415, 86 N. Y. Suppl. 959.

39. Peck *v.* Martin, 17 Ind. 115; Hanselman *v.* Carstens, 60 Mich. 187, 27 N. W. 18; Jones *v.* Burtis, 88 Wis. 478, 60 N. W. 785.

40. Peck *v.* Martin, 17 Ind. 115.

41. Coon *v.* Vaughn, 64 Ind. 89; Scudder *v.* Crossan, 43 Ind. 343. See also Williams *v.* Nally, 45 S. W. 874, 20 Ky. L. Rep. 244, holding that even if such an allegation is necessary, the defect in failing to allege that plaintiff was free from negligence is cured where the answer and reply make up the issue on that behalf.

Indiana.— Under Burns Rev. St. (1901) § 359*a*, making contributory negligence a matter of defense, the complaint need not allege the want thereof on the part of plaintiff. Aspy *v.* Botkins, 160 Ind. 170, 66 N. E. 462.

42. Goble *v.* Dillon, 86 Ind. 327, 44 Am. Rep. 308.

43. Wormell *v.* Reins, 1 Mont. 627.

44. Goodwin *v.* Herson, 65 Me. 223.

Illustrations.— In an action against a surgeon to recover damages for injuries alleged to have ensued from his want of ordinary care and skill in the treatment of a fracture, proof that he gave assurances to plaintiff that he possessed and would exercise extraordinary skill, and effect a cure, is not admissible to support the declaration. Goodwin *v.* Hersom, 65 Me. 223. In an action by a husband and wife against a physician for malpractice in treatment of the wife, there being no allegation of loss of the wife's services, evidence that the husband was dependent on his wife for support is inadmissible. Twombly *v.* Leach, 11 Cush. (Mass.) 397. Where the declaration in an action against a physician for malpractice does not allege general incompetency in defendant, plaintiff cannot recover on that ground, but must show that defendant did not properly exercise the skill which he in fact possessed. Mayo *v.* Wright, 63 Mich. 32, 29 N. W. 832. Where a complaint in an action for malpractice alleged that by reason of defendant's negligence in the treatment of plaintiff's fractured limb it became necessary to amputate it, and that by reason of the said negligence plaintiff suffered pain and anguish, this limited defendant's liability to neglect causing loss of the limb, and no recovery could be had for pain or anguish if

dence of an express promise to cure is not necessary to sustain it.[45] One holding himself out as a surgeon is liable as well for want of skill as for negligence; and an injured party may sue for damages resulting from both, and recover, on proving damages resulting from either.[46]

7. Evidence[47] — **a. Presumptions and Burden of Proof** — (i) *As to Negligence or Want of Skill.* In an action against a physician for malpractice, no presumption of negligence or want of skill can arise from the fact that defendant failed to effect a cure.[48] The burden of proof in such a case is on plaintiff to show the physician's want of reasonable care, skill, and diligence in his treatment of the case,[49] and also that the injury complained of resulted from a failure to exercise these requisites.[50] Consent to an operation will be presumed from volun-

such loss was not caused by his negligence. Jacobs *v.* Cross, 19 Minn. 523. On a complaint for malpractice, charging negligence and want of skill in treating a fractured limb, by reason of which the same had to be amputated, evidence of the manner in which such amputation was performed is not competent, no lack of care or skill in that respect being charged. Jacobs *v.* Cross, *supra*. Where, in an action against a surgeon for alleged malpractice, the petition alleged unskilfulness in the treatment of the broken limb, and the answer traversed such allegation, without averring any hereditary peculiarity as a special defense, evidence as to the weakness of the bones of plaintiff's family was inadmissible. West *v.* Martin, 31 Mo. 375, 80 Am. Dec. 107. Where, in an action for malpractice, the character of the wound is stated in the answer, and not disputed by the replication, plaintiff will not be permitted to prove that it was not of the character alleged. Williams *v.* Poppleton, 3 Oreg. 139. The averment, in an action against a physician for malpractice, that defendant was employed at his special instance and request, is technical, and is sufficiently proved by showing that defendant held himself out as a practitioner soliciting public patronage, and that the employment was by mutual consent. Musser *v.* Chase, 29 Ohio St. 577. In an action for malpractice, plaintiff cannot give evidence that the physician abandoned the patient, and refused to prescribe, unless it is so laid in the declaration. Bemus *v.* Howard, 3 Watts (Pa.) 255. See also Dashiell *v.* Griffith, 84 Md. 363, 35 Atl. 1094. *Compare* Lawson *v.* Conaway, 37 W. Va. 159, 16 S. E. 564, 38 Am. St. Rep. 17, 18 L. R. A. 627. Under an allegation that "the defendant wrongfully, carelessly, negligently, and unskillfully performed said amputation," evidence is admissible showing that "the point of amputation was too high, and that the danger of death was somewhat increased by the selection of that point." Wright *v.* Hardy, 22 Wis. 348.

45. Hoopingarner *v.* Levy, 77 Ind. 455.

46. Carpenter *v.* Blake, 60 Barb. (N. Y.) 488 [*reversed* on other grounds in 50 N. Y. 696].

47. Evidence generally see 16 Cyc. 821 *et seq.*

48. *Illinois.*— Red Cross Medical Service Co. *v.* Green, 126 Ill. App. 214; Sims *v.* Parker, 41 Ill. App. 284.

Iowa.— Tomer *v.* Aiken, 126 Iowa 114, 101 N. W. 769; Piles *v.* Hughes, 10 Iowa 579.

Kansas.— Pettigrew *v.* Lewis, 46 Kan. 78, 26 Pac. 458.

Michigan.— Wood *v.* Barker, 49 Mich. 295, 13 N. W. 597.

Minnesota.— Staloch *v.* Holm, 100 Minn. 276, 111 N. W. 264, 9 L. R. A. N. S. 712.

Nebraska.— Barney *v.* Pinkham, 29 Nebr. 350, 45 N. W. 694, 26 Am. St. Rep. 389.

New York.— Bellinger *v.* Craigue, 31 Barb. 534.

Ohio.— Craig *v.* Chambers, 17 Ohio St. 253.

Pennsylvania.— Wohlert *v.* Seibert, 23 Pa. Super. Ct. 213; Haire *v.* Reese, 7 Phila. 138.

West Virginia.— Dye *v.* Corbin, 59 W. Va. 266, 53 S. E. 147.

Canada.— Hodgins *v.* Banting, 12 Ont. L. Rep. 117.

See 39 Cent. Dig. tit. "Physicians and Surgeons," § 39.

49. *Georgia.*— Georgia Northern R. Co. *v.* Ingram, 114 Ga. 639, 40 S. E. 708.

Illinois.— Holtzman *v.* Hoy, 118 Ill. 534, 8 N. E. 832, 59 Am. Rep. 390; McKee *v.* Allen, 94 Ill. App. 147; Sims *v.* Parker, 41 Ill. App. 284.

Iowa.— Robinson *v.* Campbell, 47 Iowa 625.

Kansas.— Pettigrew *v.* Lewis, 46 Kan. 78, 26 Pac. 458.

Maryland.— State *v.* Housekeeper, 70 Md. 162, 16 Atl. 382, 14 Am. St. Rep. 340, 2 L. R. A. 587.

Minnesota.—Getchell *v.* Hill, 21 Minn. 464.

New Hampshire.— Leighton *v.* Sargent, 31 N. H. 119, 64 Am. Dec. 323.

New York.— Wood *v.* Wyeth, 106 N. Y. App. Div. 21, 94 N. Y. Suppl. 360; Wells *v.* World's Dispensary Medical Assoc., 9 N. Y. St. 452.

Ohio.— Craig *v.* Chambers, 17 Ohio St. 253.

West Virginia.— Dye *v.* Corbin, 59 W. Va. 266, 53 S. E. 147.

United States.— Ewing *v.* Goode, 78 Fed. 442.

Canada.— McQuay *v.* Eastwood, 12 Ont. 402.

See 39 Cent. Dig. tit. "Physicians and Surgeons," § 39.

50. *Georgia.*— Georgia Northern R. Co. *v.* Ingram, 114 Ga. 639, 40 S. E. 708.

Illinois.— McKee *v.* Allen, 94 Ill. App. 147.

Kansas.— Pettigrew *v.* Lewis, 46 Kan. 78, 26 Pac. 458.

tary submission to it, and the burden is on plaintiff to prove the contrary.[51] Where the physician sets up an affirmative defense, the burden is on him to prove it.[52]

(II) *As to Contributory Negligence.* The general rules as to the burden of proving contributory negligence in negligence cases are applicable in actions for negligence of a physician or malpractice.[53]

b. Admissibility — (I) *Knowledge and Skill of Defendant.* While there is some difference of opinion in the cases, the weight of authority is to the effect that, although the skill of defendant, or the want of it, is put in issue in a suit for malpractice, his reputation in that respect is not a defense, and evidence to establish it will be excluded.[54] Other cases hold that, where the action is for negligence, and the skill of the physician is not put in issue, he cannot show his general reputation for skill;[55] but where both negligence and want of skill are charged, it is competent for defendant to show his skill and reputation in that behalf.[56] Specific acts, however, are never competent to prove skill and competency.[57] Nor can the fact that a physician is reputed to be negligent and unskilful be allowed as proof to establish negligence or unskilful treatment in a particular case.[58] It has been held competent, however, for plaintiff to show, as affecting the skill and knowledge of the physician placed in charge of the case, that he was engaged largely in pursuits other than his profession of medicine and surgery.[59] But it is proper to exclude, on the ground of remoteness, testimony as

Minnesota.—Getchell *v.* Hill, 21 Minn. 464.

Ohio.— Craig *v.* Chambers, 17 Ohio St. 253.

Pennsylvania.— Wohlert *v.* Seibert, 23 Pa. Super. Ct. 213.

West Virginia.— Dye *v.* Corbin, 59 W. Va. 266, 53 S. E. 147.

United States.— Ewing *v.* Goode, 78 Fed. 442.

Canada.— McQuay *v.* Eastwood, 12 Ont. 402.

See 39 Cent. Dig. tit. "Physicians and Surgeons," § 39.

51. State *v.* Housekeeper, 70 Md. 162, 16 Atl. 382, 14 Am. St. Rep. 340, 2 L. R. A. 587. See also *supra*, IV, B, 7, a.

52. Chase *v.* Nelson, 39 Ill. App. 53, holding, however, that in an action against a physician for malpractice alleged to have caused the death of plaintiff's intestate, where defendant pleads the general issue, he may show the condition of the patient's health, and that death would have resulted in any event, without assuming the burden of proving that the negligent act of his own did not produce death.

Discharge by patient.— If a surgeon, called to attend one who has long been his employer, leaves his patient before he has been properly cared for professionally, or while he needs further attention, and relies on an alleged discharge by the patient as a defense to a suit brought for the abandonment, this being a new substantive matter of defense, the burden of proving it is on defendant. Ballou *v.* Prescott, 64 Me. 305.

53. See Negligence, 29 Cyc. 601.

In Indiana in an action against a physician for unskilfulness, the burden of proving that the negligence of plaintiff contributed to the injury is on defendant. Gramm *v.* Boener, 56 Ind. 497.

In Iowa in an action for malpractice, the burden is on plaintiff to show his freedom from negligence contributing to the result complained of. Whitesell *v.* Hill, (1896) 66 N. W. 894.

54. Holtzman *v.* Hoy, 118 Ill. 534, 8 N. E. 832, 59 Am. Rep. 390 [*affirming* 19 Ill. App. 459]; Stevenson *v.* Gelsthorpe, 10 Mont. 563, 27 Pac. 404; Williams *v.* Peppleton, 3 Oreg. 139; Mertz *v.* Detweiler, 8 Watts & S. (Pa.) 376.

The general reputation among the profession of the medical institution at which a surgeon may have attended lectures on the subject of surgery is not competent evidence, on the question of his professional skill. Leighton *v.* Sargent, 31 N. H. 119, 64 Am. Dec. 323.

Evidence of prior good character.— Evidence of good character as a physician, several years prior to the time of injury, caused by malpractice, is inadmissible to rebut the charge of negligence at the time of the injury. Smith *v.* Stump, 12 Ind. App. 359, 40 N. E. 279.

55. Alexander *v.* Menefee, 64 S. W. 855, 23 Ky. L. Rep. 1151; Degnan *v.* Ransom, 83 Hun (N. Y.) 267, 31 N. Y. Suppl. 966. But see Carpenter *v.* Blake, 50 N. Y. 696 [*reversing* 60 Barb. 488].

56. Vanhooser *v.* Berghoff, 90 Mo. 487, 3 S. W. 72; Leighton *v.* Sargent, 27 N. H. 460, 59 Am. Dec. 388.

57. Baker *v.* Hancock, 29 Ind. App. 456, 63 N. E. 323, 64 N. E. 38; Lacy *v.* Kossuth County, 106 Iowa 16, 75 N. W. 689; Link *v.* Sheldon, 18 N. Y. Suppl. 815 [*affirmed* in 136 N. Y. 1, 32 N. E. 696].

58. Stevenson *v.* Gelsthorpe, 10 Mont. 563, 27 Pac. 404.

59. Hess *v.* Lowrey, 122 Ind. 225, 23 N. E. 156, 17 Am. St. Rep. 355, 7 L. R. A. 90.

In rebuttal.— In an action for malpractice, it is competent for plaintiff to show that defendant was not a regularly bred physician and surgeon, for the purpose of rebutting evi-

to how defendant's treatment of like cases differed from that of other physicians.[60] So also evidence that defendant procured his certificate of proficiency from the state board of examiners without examination, by means of diplomas irregularly obtained from medical schools, is irrelevant, as are also defendant's statements concerning such diplomas.[61]

(II) *NEGLIGENCE.* In an action for malpractice evidence on the question of negligence, forming a part of the *res gestæ*, is admissible.[62] Plaintiff may show, by any legal evidence, that the method of treatment followed by the physician was improper.[63] Defendant may give in rebuttal any proper evidence tending to show want of negligence on his part.[64] Defendant may state what, from his study and experience, he deems proper treatment of the case in question,[65] and may show by experts that the treatment he gave was such as a physician of ordinary knowledge and skill would have given.[66] Evidence that he employed another skilful physician to assist him is competent,[67] but not to prove either

dence introduced by him to support his general professional character. Grannis *v.* Branden, 5 Day (Conn.) 260, 5 Am. Dec. 143.

60. Challis *v.* Lake, 71 N. H. 90, 51 Atl. 260.

61. Bute *v.* Potts, 76 Cal. 304, 18 Pac. 329.

62. See cases cited *infra*, this note.

Declarations of plaintiff.— O'Hara *v.* Wells, 14 Nebr. 403, 15 N. W. 722.

Declarations of defendant.—Piles *v.* Hughes, 10 Iowa 579; Moody *v.* Sabin, 9 Cush. (Mass.) 505.

Exclamations of pain.—In an action against a surgeon for malpractice in treating a broken leg, evidence as to complaints made by plaintiff in regard to the pain suffered is admissible (Spaulding *v.* Bliss, 83 Mich. 311, 47 N. W. 210; Mayo *v.* Wright, 63 Mich. 32, 29 N. W. 832; Hyatt *v.* Adams, 16 Mich. 180; Link *v.* Sheldon, 18 N. Y. Suppl. 815 [*affirmed* in 136 N. Y. 1, 32 N. E. 696]); but his conclusion as to the cause of the pain is not admissible (Spaulding *v.* Bliss, *supra*. See also Mayo *v.* Wright, *supra*).

Intoxication of defendant.— Defendant's condition, as to being intoxicated, at the time he treated plaintiff, may be shown. Merrill *v.* Pepperdine, 9 Ind. App. 416, 36 N. E. 921.

Remarks of bystanders at time of examination.— Where, in an action for injury, resulting from a surgeon's unskilfulness in treating a dislocation as a fracture, it was shown that, if his diagnosis was correct, a grating sound would have been heard on manipulation of the limb, evidence may be given of remarks made by bystanders at the time of the examination that they heard such a sound. Hitchcock *v.* Burgett, 38 Mich. 501.

A consultation held on the occasion of the alleged improper treatment may be given in evidence as a part of the *res gestæ*. Williams *v.* Poppleton, 3 Oreg. 139.

63. Kendall *v.* Brown, 86 Ill. 387.

Failure to demand compensation.— Evidence that defendant had not asked any pay for his services is inadmissible since this raises a collateral issue. Baird *v.* Gillett, 47 N. Y. 186. See also Jones *v.* Angell, 95 Ind. 376.

64. See cases cited *infra*, this note.

Illustrations.— Where the manner of the treatment is in issue, defendants may properly be asked if therein they exercised their best judgment and skill. The answer may rebut the charge of negligence. Fisher *v.* Niccolls, 2 Ill. App. 484. A physician, sued for negligently applying to plaintiff's ankle liquid glass made by W, a druggist, and not so compounded as to neutralize the caustic elements, whereby the ankle was burned, may testify to his knowing of W holding himself out and advertising himself as a manufacturing chemist, at the time the solution was obtained; as in such case, in the absence of some circumstance which should have put the physician on his guard, he would not be chargeable with negligence in using the solution. Ball *v.* Skinner, 134 Iowa 298, 111 N. W. 1022. In an action for negligently performing a surgical operation on plaintiff's eye, alleged to have caused a loss of plaintiff's sight, evidence that the disease from which plaintiff was suffering generally resulted in a loss of sight is competent. Peck *v.* Hutchinson, 88 Iowa 320, 55 N. W. 511. In an action for malpractice in treating a cut on plaintiff's thumb, defendant may show that it is good medical treatment in some cases to withhold from a patient the extent of the disease and his actual condition. Twombly *v.* Leach, 11 Cush. (Mass.) 397. Defendant may testify that he refrained from making further visits on plaintiff because defendant was told by a third person that he (defendant) had been discharged, but he cannot detail the conversation with such third person unless held in the presence of plaintiff. Lawson *v.* Conaway, 37 W. Va. 159, 16 S. E. 564, 38 Am. St. Rep. 17, 18 L. R. A. 627.

65. Link *v.* Sheldon, 136 N. Y. 1, 32 N. E. 696.

66. Twombly *v.* Leach, 11 Cush. (Mass.) 397; Spaulding *v.* Bliss, 83 Mich. 311, 47 N. W. 210; Leisenring *v.* La Croix, 68 Nebr. 803, 94 N. W. 1009; Quinn *v.* Higgins, 63 Wis. 664, 24 N. W. 482, 53 Am. Rep. 305; Wright *v.* Hardy, 22 Wis. 348.

67. Jones *v.* Angell, 95 Ind. 376, opinion by Colerick, C.

skill or diligence on his part.[68] It is not proper, in making out a case for plaintiff, to show negligence in other cases by proving the results of defendant's treatment in such cases;[69] but the treatment received by the patient after defendant gave up the case may be shown.[70] The opinion of a physician is admissible, as a general rule, upon questions peculiarly within his knowledge as such.[71] A non-expert witness should not be permitted to testify as to the existence of a particular injury, but he may testify as to the actual condition of the injury, no opinion being expressed.[72] Immaterial[73] and hearsay[74] evidence is of course inadmissible.

(III) *CONTRIBUTORY NEGLIGENCE.* In an action for injury from a physician's negligence, it is proper for the defense to show that it resulted from plaintiff's negligence;[75] but that fact cannot be shown by the statements of one who had no personal knowledge of it.[76]

(IV) *DEMONSTRATIVE EVIDENCE.* On a trial against a physician for malpractice, it is proper to allow plaintiff to exhibit his injured limb to the jury.[77]

e. Weight and Sufficiency — (I) *IN GENERAL.* A mere preponderance of evidence is sufficient to prove an issue in an action for malpractice.[78] Although the fact that a patient fails to recover, or suffers injury, is not in general evidence of negligence on the part of the physician,[79] yet the injury may be of such a nature that negligence must be assumed from the unexplained fact of its happening.[80]

68. Leighton *v.* Sargent, 31 N. H. 119, 64 Am. Dec. 323.

69. Shockley *v.* Tucker, 127 Iowa 456, 103 N. W. 360.

70. Bower *v.* Self, 68 Kan. 825, 75 Pac. 1021; Leisenring *v.* La Croix, 68 Nebr. 803, 94 N. W. 1009.

71. Purcell *v.* Jessup, 99 N. Y. App. Div. 556, 91 N. Y. Suppl. 165.

72. Williams *v.* Nally, 45 S. W. 874, 20 Ky. L. Rep. 244; O'Hara *v.* Wells, 14 Nebr. 403, 15 N. W. 722.

73. Wright *v.* Hardy, 22 Wis. 348.

74. Sims *v.* Moore, 61 Iowa 128, 16 N. W. 58, holding that, in an action for damages against a surgeon for malpractice, plaintiff cannot, under the guise of a conversation with defendant, testify to the opinion of another surgeon, who examined the parts operated on.

75. Hitchcock *v.* Burgett, 38 Mich. 501.

76. Hitchcock *v.* Burgett, 38 Mich. 501.

77. Hess *v.* Lowrey, 122 Ind. 225, 23 N. E. 156, 17 Am. St. Rep. 355, 7 L. R. A. 90; Freeman *v.* Hutchinson, 15 Ind. App. 639, 43 N. E. 16; Williams *v.* Nally, 45 S. W. 874, 20 Ky. L. Rep. 244; Walsh *v.* Sayre, 52 How. Pr. (N. Y.) 334; Fowler *v.* Sergeant, 1 Grant (Pa.) 355. But see Carstens *v.* Hanselman, 61 Mich. 426, 28 N. W. 159, 1 Am. St. Rep. 606, after lapse of several years from date of treatment.

78. Hoener *v.* Koch, 84 Ill. 408; Wood *v.* Wyeth, 106 N. Y. App. Div. 21, 94 N. Y. Suppl. 360.

Evidence held sufficient to support verdict for plaintiff see McGehee *v.* Schiffman, 4 Cal. App. 50, 87 Pac. 290; Davis *v.* Spicer, 27 Mo. App. 279; Boom *v.* Reed, 69 Hun (N. Y.) 426, 23 N. Y. Suppl. 421; Barton *v.* Govan, 4 N. Y. St. 876; Froman *v.* Ayars, 42 Wash. 385, 85 Pac. 14; Gates *v.* Fleischer, 67 Wis. 504, 30 N. W. 674.

Evidence held insufficient to support verdict for plaintiff.— Where, in an action against a surgeon for damages caused by his unskilfulness or negligence, there is no evidence of want of ordinary skill, or failure to use the best skill possessed by defendant, or any negligence in the care of the case, which resulted in plaintiff's injury, a verdict for plaintiff must be set aside. Winner *v.* Lathrop, 67 Hun (N. Y.) 511, 22 N. Y. Suppl. 516. See also Feeney *v.* Spalding, 89 Me. 111, 35 Atl. 1027; Neifert *v.* Hasley, 149 Mich. 232, 112 N. W. 705; Staloch *v.* Holm, 100 Minn. 276, 111 N. W. 264, 9 L. R. A. N. S. 712; Wood *v.* Wyeth, 106 N. Y. App. Div. 21, 94 N. Y. Suppl. 360; MacKenzie *v.* Carman, 103 N. Y. App. Div. 246, 92 N. Y. Suppl. 1063; Smith *v.* Dumont, 3 Silv. Sup. (N. Y.) 358, 6 N. Y. Suppl. 242; English *v.* Free, 205 Pa. St. 624, 55 Atl. 777; Bigney *v.* Fisher, 26 R. I. 402, 59 Atl. 72; Wurdemann *v.* Barnes, 92 Wis. 206, 66 N. W. 111.

Evidence held sufficient to authorize verdict for defendant see Akridge *v.* Noble, 114 Ga. 949, 41 S. E. 78; Pepke *v.* Grace Hospital, 130 Mich. 493, 90 N. W. 278; Martin *v.* Courtney, 87 Minn. 197, 91 N. W. 487; Gedney *v.* Kingsley, 16 N. Y. Suppl. 792.

Evidence held sufficient to show contributory negligence see Richards *v.* Willard, 176 Pa. St. 181, 35 Atl. 114, where plaintiff prematurely left the hospital.

79. See *supra*, IV, F, 7, a, (I).

80. See cases cited *infra*, this note.

Illustrations.— That plaintiff was severely burned by X-rays while being treated by defendant for appendicitis is of itself evidence that the treatment was improper. Shockley *v.* Tucker, 127 Iowa 456, 103 N. W. 360. Evidence showing that after a broken ankle was reset the ankle and foot were crooked, and the ankle joint stiff, tends to prove negligence on the part of the physician in replacing the broken bones, and should be submitted to the jury. Hickerson *v.* Neely, 54 S. W. 842, 21 Ky. L. Rep. 1257. Unex-

It is not necessary, to sustain a verdict for plaintiff, that all the expert witnesses called should consider the treatment pursued by defendant improper, nor will the fact that all such witnesses agree that a portion of the treatment is proper under some circumstances in itself defeat a recovery.[81] In determining the relative value of the evidence of medical experts in an action for surgical malpractice, the jury are to consider their professional knowledge and experience, freedom from bias, and the reasons they are able to give for their conclusions.[82]

(II) *To Require Submission to Jury.* Where the evidence is as consistent with the absence as with the existence of negligence, the case should not be left to the jury.[83]

8. Questions For Jury. What constitutes ordinary skill, care, and diligence on the part of a physician and surgeon is a question of law, in this view at least, that it must be stated by the court as defined by the books;[84] but when considered in connection with the facts which it is necessary for the jury to understand in order to be able to apply it to a particular case, it becomes a mixed question of law and fact.[85] Where the evidence is conflicting as to the facts on which the opinions of expert witnesses are based, and where the opinions of such witnesses, on a given state of facts in the case, materially differ, it is for the jury to determine, and their finding is conclusive.[86] If the treatment is in accordance with a recognized system of surgery, it is not for the court or jury to undertake to determine whether that system is the best, nor to decide questions of surgical science on which surgeons differ among themselves.[87]

9. Instructions — a. In General. In an action for malpractice, the court should make an adequate presentation of the case to the jury, explaining the precise questions at issue, and directing attention to the material evidence on both sides.[88] The jury should be instructed as to the necessity of the employment of

plained, the fact that the physician attending a woman at child-birth failed to remove all of the placenta, thereby occasioning blood poisoning, justifies a conclusion of negligence. Moratzky *v.* Wirth, 67 Minn. 46, 69 N. W. 480.

81. Hewitt *v.* Eisenbart, 36 Nebr. 794, 55 N. W. 252. See also Barker *v.* Lane, 23 R. I. 224, 49 Atl. 963.

82. Bennison *v.* Walbank, 38 Minn. 313, 37 N. W. 447.

83. McQuay *v.* Eastwood, 12 Ont. 402; Storey *v.* Veach, 22 U. C. C. P. 164; Jackson *v.* Hyde, 28 U. C. Q. B. 294.

Testimony which does not show want of ordinary care and skill is not entitled to go to the jury. Havens *v.* Hardesty, 18 Ohio Cir. Ct. 891, 9 Ohio Cir. Dec. 850.

Evidence held sufficient to require submission to jury see Degelau *v.* Wight, 114 Iowa 52, 86 N. W. 36; Peterson *v.* Wells, 41 Wash. 693, 84 Pac. 608.

Evidence held sufficient to warrant direction of nonsuit see De Long *v.* Delaney, 206 Pa. St. 226, 55 Atl. 965.

84. Tefft *v.* Wilcox, 6 Kan. 46.

85. Tefft *v.* Wilcox, 6 Kan. 46; Chamberlain *v.* Porter, 9 Minn. 260.

It is the duty of the court to say whether any facts have been established by evidence from which negligence may be reasonably inferred: the jury have to say whether, from those facts, negligence ought to be inferred. Fields *v.* Rutherford, 29 U. C. C. P. 113; Jackson *v.* Hyde, 28 U. C. Q. B. 294, Adam Wilson, J., delivering the opinion of the court.

86. *California.*—Bailey *v.* Kreutzmann, 141 Cal. 519, 75 Pac. 104.

Georgia.— Moon *v.* McRae, 111 Ga. 206, 36 S. E. 635.

Iowa.— Tomer *v.* Aiken, 126 Iowa 114, 101 N. W. 769.

Minnesota.— Bennison *v.* Walbank, 38 Minn. 313, 37 N. W. 447.

Missouri.— Vanhooser *v.* Berghoff, 90 Mo. 487, 3 S. W. 72.

Nebraska.— Griswold *v.* Hutchinson, 47 Nebr. 727, 66 N. W. 819.

New York.— Link *v.* Sheldon, 136 N. Y. 1, 32 N. E. 696; Du Bois *v.* Decker, 130 N. Y. 325, 29 N. E. 313, 27 Am. St. Rep. 529, 14 L. R. A. 429 [*affirming* 4 N. Y. Suppl. 768]; Wells *v.* World's Dispensary Medical Assoc., 120 N. Y. 630, 24 N. E. 276; Carpenter *v.* Blake, 60 Barb. 488 [*reversed* on other grounds in 50 N. Y. 696]; Boldt *v.* Murray, 2 N. Y. St. 232; Keily *v.* Colton, 1 N. Y. City Ct. 439.

Pennsylvania.— Hawkins' Appeal, 13 York Leg. Rec. 199.

See 39 Cent. Dig. tit. "Physicians and Surgeons," § 44.

But see Woodward *v.* Hancock, 52 N. C. 384, holding that what is reasonable skill and due care in a physician in the treatment of a patient is a question of law; and it is error to leave it to be determined by the jury.

87. Williams *v.* Poppleton, 3 Oreg. 139.

88. Richards *v.* Willard, 176 Pa. St. 181, 35 Atl. 114; Reber *v.* Herring, 115 Pa. St. 599, 8 Atl. 830.

the physician,[89] and as to the duty of the physician to exercise reasonable skill and care in his treatment of the case.[90] Instructions should be given relative to the burden of proof,[91] and, if the issue is raised, as to the care required of plaintiff, and the effect of his contributory negligence.[92] It is not sufficient to give a general instruction on the subject.[93] The instructions given should be confined

89. Miller *v.* Dumon, 24 Wash. 648, 64 Pac. 804, holding that a charge that, in order to recover for malpractice, the jury must be satisfied by a preponderance of evidence that defendant, acting as a surgeon, unskilfully and negligently treated plaintiff, followed by a charge to the effect that the fact that a physician responds to a call for his professional services does not necessarily constitute an employment unless some act is done or advice given by him which indicates an intention on his part to enter on the employment, sufficiently submits the issue as to whether the physician was employed.

90. Akridge *v.* Noble, 114 Ga. 949, 41 S. E. 78; Aspy *v.* Botkins, 160 Ind. 170, 66 N. E. 462 (holding that an instruction relating to the degree of skill required by a person holding himself out as a physician and surgeon was not erroneous for failure to state that he must have had a license to practise); Carpenter *v.* Blake, 50 N. Y. 696 [*reversing* 60 Barb. 488] (holding that it is error to instruct the jury that it is immaterial whether defendant was or was not skilful in his profession); Lawson *v.* Conaway, 37 W. Va. 159, 16 S. E. 564, 38 Am. St. Rep. 17, 18 L. R. A. 627 (holding that an instruction that defendant was bound to use the ordinary degree of care and skill of the "profession" in his community is not objectionable because the word "profession" is used instead of the more accurate term, "physician in good standing."

Degree of skill and care.— There is no substantial difference in the use of the words "ordinary" and "reasonable" in defining the care and skill required of a surgeon or physician in his employment. Kendall *v.* Brown, 74 Ill. 232. The words "fair" and "reasonable" are synonymous. Jones *v.* Angell, 95 Ind. 376.

As dependent on locality.— An instruction that defendant was required to use only the degree of care and skill of the physicians in his neighborhood is not ground for reversal, where there was evidence that there were other physicians in the neighborhood presumably of average ability, when compared with similar localities. Pelky *v.* Palmer, 109 Mich. 561, 67 N. W. 561. See also Whitesell *v.* Hill, 101 Iowa 629, 70 N. W. 750, 37 L. R. A. 830, Robinson, J., delivering the opinion of the court, and Kinne, C. J., dissenting.

Continuance of attention.— Instructions that it was the duty of defendant to give the patient such continued attention after the operation as the necessity of the case required, in the absence of special agreement or reasonable notice to the contrary, are correct, although the declaration only alleges a want of care and skill with reference to the operation itself. Williams *v.* Gilman, 71 Me. 21.

Departure from approved methods.— An instruction that "a departure from approved methods in general use, if it injures the patient, will render him (the physician) liable, however good his intentions may have been," is not improper, notwithstanding the rule may render a physician liable in case he adopts new methods, although improved ones. Allen *v.* Voje, 114 Wis. 1, 89 N. W. 924. An instruction that it is incumbent on surgeons to conform to the established system of treatment of a particular disease is not erroneous or misleading on the ground that the treatment referred to is one prescribed by some writers and surgeons, and not that universally commended, where there is no conflict as to the proper mode of treatment. Jackson *v.* Burnham, 20 Colo. 532, 39 Pac. 577. Such an instruction is not misleading, where there is no claim that the case was one involving doubt as to the proper mode of treatment, and the issue and testimony relates solely to the question whether defendant neglected to follow the ordinary and clearly established practice in treating plaintiff. Jackson *v.* Burnham, *supra*.

91. Swanson *v.* French, 92 Iowa 695, 61 N. W. 407 (holding that a charge that, if plaintiff disobeyed defendant's orders, he cannot recover, does not shift to defendant the burden of proof as to contributory negligence, when a former instruction clearly placed the burden on plaintiff); Vanhooser *v.* Berghoff, 90 Mo. 487, 3 S. W. 72 (holding that an instruction is erroneous which is open to the construction that the burden is on defendant to show the possession and exercise of skill and care).

92. Whitesell *v.* Hill, (Iowa 1896) 66 N. W. 894; O'Hara *v.* Wells, 14 Nebr. 403, 15 N. W. 722; Carpenter *v.* Blake, 60 Barb. (N. Y.) 488 [*reversed* on other grounds in 50 N. Y. 696]; Beadle *v.* Paine, 46 Oreg. 424, 80 Pac. 903.

Necessity of following instructions see Whitesell *v.* Hill, (Iowa 1896) 66 N. W. 894.

Evidence of disobedience by the patient of the instructions of the physician may properly be referred to by the court in its instructions, in directing the attention of the jury to the question of contributory negligence. Jones *v.* Angell, 95 Ind. 376.

93. Reber *v.* Herring, 115 Pa. St. 599, 8 Atl. 830, holding that the jury should be distinctly charged that if the patient was guilty of contributory negligence in producing the injury complained of he cannot recover.

Refusal to charge on contributory negligence is cured by the subsequent giving of an instruction on the subject. Link *v.* Shel-

to the issues as made by the pleadings and the evidence,[94] and should not assume facts not proved,[95] or be inconsistent or misleading.[96]

b. As to Damages. An instruction that the measure of damages is full, complete, and ample compensation to the injured person is erroneous, since compensation is all that is required, and the use of the adjectives "full," "complete," and "ample" may lead the jury to believe that more than compensation is required.[97]

10. Damages[98] — a. Nominal. Where it is impossible to distinguish between the consequences of the trouble for which a physician was called and the consequences of the maltreatment, only nominal damages can be given.[99] Acceleration of the death of a patient is more than a mere technical injury, and demands an award of more than nominal damages.[1]

b. Compensatory. Where a patient is injured by a physician's negligent and unskilful treatment, the loss or injury directly and naturally resulting from his fault or negligence is the measure of damages.[2] The amount is to be determined by the jury from the facts and circumstances of the case,[3] and the pecuniary loss, resulting from inability to labor,[4] bodily and mental pain and suffer-

don, 18 N. Y. Suppl. 815 [*affirmed* in 136 N. Y. 1, 32 N. E. 696].

94. *Colorado.*— Burnham *v.* Jackson, 1 Colo. App. 237, 28 Pac. 250.

Illinois.— Wenger *v.* Calder, 78 Ill. 275, holding that, in an action against a surgeon for malpractice, where there is no evidence tending to prove wilful negligence, it is error to instruct the jury that they may find for plaintiff in any amount they deem proper, under the evidence, if they believe from the evidence that defendant was wilfully negligent.

Pennsylvania.— Richards *v.* Willard, 176 Pa. St. 181, 35 Atl. 114.

Texas.—Payne *v.* Francis, 37 Tex. 75, holding that in an action against a physician for damages alleged to be due to his unskilful treatment of a patient, it was error to instruct the jury that, if plaintiff was injured by unskilful treatment, ignorance, carelessness, or neglect, he might recover; no allegation being contained in the complaint as to carelessness or neglect.

Vermont.— Wilmot *v.* Howard, 39 Vt. 447, 94 Am. Dec. 338.

Wisconsin.—Prahl *v.* Gerhard, 25 Wis. 466, holding, however, that it was not error to instruct the jury that "if the injury was purely an accident, or from some other cause, while the defendant used and exercised a proper degree of skill, then the defendant is not liable," although there was no positive evidence of such accident or other cause.

See 39 Cent. Dig. tit. "Physicians and Surgeons," § 45.

95. Link *v.* Sheldon, 18 N. Y. Suppl. 815 [*affirmed* in 136 N. Y. 1, 32 N. E. 696], holding that the court properly refused to give instructions which assumed that the treatment of the physician who attended plaintiff after defendants were discharged was improper.

96. Whitesell *v.* Hill, 101 Iowa 629, 70 N. W. 750, 37 L. R. A. 830; Spaulding *v.* Bliss, 83 Mich. 311, 47 N. W. 210.

97. Sale *v.* Eichberg, 105 Tenn. 333, 59 S. W. 1020, 52 L. R. A. 894.

98. Damages generally see 13 Cyc. 1.

99. Becker *v.* Janinski, 15 N. Y. Suppl. 675, 27 Abb. N. Cas. 45.

1. Gray *v.* Little, 126 N. C. 385, 35 S. E. 611.

2. Dorris *v.* Warford, 100 S. W. 312, 30 Ky. L. Rep. 963, 9 L. R. A. N. S. 1090; Challis *v.* Lake, 71 N. H. 90, 51 Atl. 260.

It is the damage accruing to plaintiff in excess of that which would have accrued naturally from the illness or injury had he been treated with that degree of skill ordinarily possessed by surgeons, and not the damage resulting from the illness or injury. Wenger *v.* Calder, 78 Ill. 275; Carpenter *v.* McDavitt, 53 Mo. App. 393; Miller *v.* Frey, 49 Nebr. 472, 68 N. W. 630; Becker *v.* Janinski, 15 N. Y. Suppl. 675, 27 Abb. N. Cas. 45.

3. Chamberlain *v.* Porter, 9 Minn. 260.

The jury are the proper judges of the amount of the damages to be allowed, and unless there is something in the case showing that the jury, in their determination, were influenced by passion, prejudice, or some other improper motive, the court will not interfere. Chamberlain *v.* Porter, 9 Minn. 260.

Awards of damages permitted to stand.— One thousand dollars for negligence in the case of a broken leg whereby it was shortened three fourths of an inch. Hallam *v.* Means, 82 Ill. 379, 25 Am. Rep. 328. Two thousand dollars for the unwarranted abandonment of a confinement case. Lathrope *v.* Flood, (Cal. 1901) 63 Pac. 1007. Four thousand five hundred dollars where plaintiff was left helpless for life. Kelsey *v.* Hay, 84 Ind. 189. Seven thousand dollars for malpractice in setting a broken arm. Getchell *v.* Lindley, 24 Minn. 265.

4. Tefft *v.* Wilcox, 6 Kan. 46; Dorris *v.* Warford, 100 S. W. 312, 30 Ky. L. Rep. 963, 9 L. R. A. N. S. 1090.

A married woman who is not carrying on business or performing labor on her sole and separate account cannot, in an action against a physician for malpractice, recover for loss

ing,[5] loss of time,[6] and actual expenses incurred,[7] if resulting from or through the want of skill or care of the physician, may be taken into account, as so likewise may the character of the injury, as whether it is permanent or temporary,[8] and the condition or circumstances of the injured party.[9] Where the defense of contributory negligence is interposed, the jury should be warned to allow nothing for any aggravation of injury or new injury caused by plaintiff's own imprudence,[10] and evidence that another physician subsequently treated plaintiff improperly is competent to reduce the amount to be allowed.[11]

c. Exemplary or Punitive. While it has been held that exemplary damages for malpractice can be recovered only where the evidence shows an evil motive in the act complained of,[12] the weight of authority is to the effect that such damages may also be recovered where a physician has been guilty of gross negligence amounting to reckless indifference in treating a patient.[13]

of services and earnings. Becker *v.* Janinski, 15 N. Y. Suppl. 675, 27 Abb. N. Cas. 45.

5. *California.*— Lathrope *v.* Flood, (1901) 63 Pac. 1007.

Georgia.— Smith *v.* Overby, 30 Ga. 241, holding that in an action by a husband and wife against a physician for an injury to the wife in delivering her of a child, damages may be given for the mental suffering of the wife produced by the destruction of the child.

Kansas.— Tefft *v.* Wilcox, 6 Kan. 46.

Kentucky.— Piper *v.* Menifee, 12 B. Mon. 465, 54 Am. Dec. 547; Dorris *v.* Warford, 100 S. W. 312, 30 Ky. L. Rep. 963, 9 L. R. A. N. S. 1090.

Minnesota.— Chamberlain *v.* Porter, 9 Minn. 260.

New York.— Becker *v.* Janinski, 15 N. Y. Suppl. 675, 27 Abb. N. Cas. 45.

North Carolina.— McCracken *v.* Smathers, 122 N. C. 799, 29 S. E. 354.

See 39 Cent. Dig. tit. "Physicians and Surgeons," § 46.

Suffering caused by malpractice only to be considered.— The jury should be warned, in an action for malpractice, to allow nothing for the pain and suffering caused by the original injury, but only for what was added by the lack of care and skill in its treatment. Carpenter *v.* McDavitt, 53 Mo. App. 393. See also Wenger *v.* Calder, 78 Ill. 275.

Action by husband for wife's injury.— For injuries inflicted on a wife during a surgical operation, which resulted in her death, the husband is entitled to recover only for the actual damage caused to him by the injury, and which accrued prior to her death; and he can have no action for his or her mental suffering, as such action must be restricted to the person who received the physical injury. Hyatt *v.* Adams, 16 Mich. 180.

6. Tefft *v.* Wilcox, 6 Kan. 46; Piper *v.* Menifee, 12 B. Mon. (Ky.) 465, 54 Am. Dec. 547; McCracken *v.* Smathers, 122 N. C. 799, 29 S. E. 354.

7. Tefft *v.* Wilcox, 6 Kan. 46; Hewitt *v.* Eisenbart, 36 Nebr. 794, 55 N. W. 252 (holding, however, that there can be no recovery for expense incurred in efforts to cure an injury, unless it be shown that the expense was the result of defendant's negligence, and that it was reasonably necessary); Becker *v.* Janinski, 15 N. Y. Suppl. 675, 27 Abb. N. Cas. 45.

8. Tefft *v.* Wilcox, 6 Kan. 46; Dorris *v.* Warford, 100 S. W. 312, 30 Ky. L. Rep. 963, 9 L. R. A. N. S. 1090; Chamberlain *v.* Porter, 9 Minn. 260; McCracken *v.* Smathers, 122 N. C. 799, 29 S. E. 354. But see Dulaney *v.* Nunnery, 7 Ky. L. Rep. 292, holding that, in an action against a surgeon for malpractice, plaintiff's expectancy of life had nothing to do in estimating the damages he was entitled to recover, although his arm had become useless as the result of defendant's negligence; and it was error to admit life-tables as evidence, for the purpose of showing his expectancy of life.

Prospective damages.— Recovery for malpractice by a physician may embrace prospective as well as accrued damages. Howell *v.* Goodrich, 69 Ill. 556; Becker *v.* Janinski, 15 N. Y. Suppl. 675, 27 Abb. N. Cas. 45.

Testimony as to the physical condition of plaintiff just before trial, and two or more years after undergoing the treatment complained of, is competent, when such condition is shown to be the result of the injury in question, and is of a permanent nature. Hewitt *v.* Eisenbart, 36 Nebr. 794, 55 N. W. 252.

9. Tefft *v.* Wilcox, 6 Kan. 46; Chamberlain *v.* Porter, 9 Minn. 260; Fowler *v.* Sergeant, 1 Grant (Pa.) 355.

10. Carpenter *v.* McDavitt, 53 Mo. App. 393.

11. Doyle *v.* New York Eye, etc., Infirmary, 80 N. Y. 631.

12. Hyatt *v.* Adams, 16 Mich. 180.

13. Cochran *v.* Miller, 13 Iowa 128; Gray *v.* Little, 126 N. C. 385, 35 S. E. 611; Brooke *v.* Clark, 57 Tex. 105.

Operation by unlicensed dentist.— Exemplary damages are recoverable from defendants who, in conducting the business of dentistry, caused plaintiff to be operated on by an employee who was unlicensed as a dentist, and through whose negligence and want of skill he suffered a severe injury. Mandeville *v.* Courtright, 142 Fed. 97, 73 C. C. A. 321, 6 L. R. A. N. S. 1003 [*reversing* 126 Fed. 1007].

11. New Trial.[14] Where the verdict in a malpractice case is manifestly against the great preponderance of the evidence, it is an abuse of discretion not to grant a new trial.[15] A new trial on account of excessive damages for malpractice will only be granted where they are so excessive as to indicate that the jury acted from prejudice, partiality, or corruption, or were misled as to the proper measure of damages.[16]

12. Review. The admission of evidence,[17] or the giving of an instruction,[18] not prejudicial to either party, is not fatal error. Where there is a conflict in the testimony of the experts, and no great preponderance either way, the verdict of the jury will not be disturbed.[19] Where, however, the evidence greatly preponderates against the verdict, it will be set aside.[20]

V. COMPENSATION.[21]

A. Right to Compensation[22] — **1. In General.** In England, under the common law, a medical practitioner had no remedy at law to recover a remuneration for his services. He was presumed to act with a view only to an honorary reward.[23] He might, however, recover on an express contract to remunerate him for his attendance.[24] This rule has never been in force in this country, and a physician is entitled to recover for his services in the same manner as any other person who performs services for another.[25] And since 21 & 22 Vict. c. 90, a physician may also recover for his services in England without an express contract.[26] An employment of a physician by a party, without express agreement as to compensation, raises an implied agreement on the part of the employer to pay what the services are reasonably worth.[27] Physicians and surgeons can recover for the services of their students in attendance on their patients,[28] and also for the services of such assistants as they may require.[29]

14. New trial generally see New Trial, 29 Cyc. 707.

15. Martin *v.* Courtney, 75 Minn. 255, 77 N. W. 813.

16. Kelsey *v.* Hay, 84 Ind. 189.

17. Jones *v.* Angell, 95 Ind. 376; Prahl *v.* Gerhard, 25 Wis. 466.

18. O'Hara *v.* Wells, 14 Nebr. 403, 15 N. W. 722.

19. Whitesell *v.* Hill, (Iowa 1896) 66 N. W. 894; Getchell *v.* Lindley, 24 Minn. 265; Van Skike *v.* Potter, 53 Nebr. 28, 73 N. W. 295; Van-Mere *v.* Farewell, 12 Ont. 285.

20. Yaggle *v.* Allen, 24 N. Y. App. Div. 594, 48 N. Y. Suppl. 827.

21. **Compensation:** As witness see Witnesses. For examining person for insanity see Insane Persons. For services to poor persons see Paupers.

Account stated between physician and patient see Accounts and Accounting, 1 Cyc. 387 text and note 2.

22. **Port physician's fee** invalid see Commerce, 7 Cyc. 437 note 5.

23. Chorley *v.* Bolcot, 4 T. R. 317, 2 Rev. Rep. 395; Chitty Contr. 573. See also Lipscombe *v.* Holmes, 2 Campb. 441.

24. Veitch *v.* Russell, 3 Q. B. 928, 43 E. C. L. 1041, C. & M. 362, 41 E. C. L. 201, 3 G. & D. 198, 7 Jur. 60, 12 L. J. Q. B. 13 (holding that proof of an express contract must be clear); Atty.-Gen. *v.* Royal College of Physicians, 1 Johns. & H. 561, 7 Jur. N. S. 511, 30 L. J. Ch. 757, 4 L. T. Rep. N. S. 356, 9 Wkly. Rep. 590, 20 Eng. Reprint 868.

25. Peck *v.* Martin, 17 Ind. 115; Judah *v.* McNamee, 3 Blackf. (Ind.) 269; Green *v.* Higenbotam, 3 N. J. L. J. 60; Mooney *v.* Lloyd, 5 Serg. & R. (Pa.) 416; Graham *v.* Gautier, 21 Tex. 111.

The right to adequate compensation for medical services rendered by a physician arises upon their rendition wherever fees are otherwise recoverable by suit at law. Ely *v.* Wilbur, 49 N. J. L. 358, 10 Atl. 441, 60 Am. Rep. 668.

26. Gibbon *v.* Budd, 2 H. & C. 92, 9 Jur. N. S. 525, 32 L. J. Exch. 182, 8 L. T. Rep. N. S. 321, 11 Wkly. Rep. 626.

Traveling expenses.— When no special agreement is made to remunerate a physician, he cannot recover expenses out of pocket, in traveling to attend his patient, for such expenses are incidental to the attendance, and to be considered as money paid to the physician's own use in the ordinary exercise of his profession. Veitch *v.* Russell, 3 Q. B. 928, 43 E. C. L. 1041, C. & M. 362, 41 E. C. L. 201, 3 G. & D. 198, 7 Jur. 60, 12 L. J. Q. B. 13.

27. Peck *v.* Martin, 17 Ind. 115; Pryor *v.* Milburn, 51 Misc. (N. Y.) 596, 101 N. Y. Suppl. 34.

28. People *v.* Monroe Ct. C. Pl., 4 Wend. (N. Y.) 200, holding that a statute prohibiting the recovery of fees by unlicensed physicians does not prevent recovery for such services.

29. Jay County *v.* Brewington, 74 Ind. 7.

Unqualified assistant.— But it has been held that a qualified practitioner is not

2. As Dependent on Right to Practice — a. In General. In the absence of a statute requiring a license, or prohibiting the practice of medicine without it for a fee or reward, an unlicensed physician is entitled to recover for his services.[30] Every state has now enacted statutes regulating the practice of medicine,[31] and in several unqualified practitioners are expressly prohibited from recovering for their services.[32] In the majority of the states, however, no express provision on the subject exists, but the courts have held, almost without exception, that even in the absence of an express prohibition, a physician may not recover for professional services unless he shows compliance with the requirements of the statute as to qualification.[33] Where the statute further requires that the certificate of qualification be registered, a physician who has not complied with such requirement is not entitled to recover his fees,[34] unless such registration is not made a

entitled to recover for services rendered by an unqualified assistant without consulting him. Howarth *v.* Brearley, 19 Q. B. D. 303, 51 J. P. 440, 56 L. J. Q. B. 543, 56 L. T. Rep. N. S. 743, 36 Wkly. Rep. 302.

30. Bronson *v.* Hoffman, 7 Hun (N. Y.) 674; Bailey *v.* Mogg, 4 Den. (N. Y.) 60.

31. See *supra*, II.

32. *Louisiana.*— Czarnowski *v.* Zeyer, 35 La. Ann. 796.

Maine.— Holmes *v.* Halde, 74 Me. 28, 43 Am. Rep. 567.

Massachusetts.— Hewitt *v.* Charier, 16 Pick. 353.

Nebraska.— Maxwell *v.* Swigart, 48 Nebr. 789, 67 N. W. 789.

North Carolina.— Puckett *v.* Alexander, 102 N. C. 95, 8 S. E. 767, 3 L. R. A. 43.

See 39 Cent. Dig. tit. "Physicians and Surgeons," § 51.

Maryland — Notice of intention to dispute claim.—Acts (1821), c. 217, prohibiting an unauthorized practitioner "from and after the passage" thereof from recovering his fees, provided defendant gives ten days' notice of his intention to dispute the claim, embraces all cases where the attempt to recover is subsequent to its passage. Berry *v.* Scott, 2 Harr. & G. 92.

33. *Alabama.*— Harrison *v.* Jones, 80 Ala. 412. Otherwise under a former statute. Richardson *v.* Dorman, 28 Ala. 679.

California.— Roberts *v.* Levy, (1892) 31 Pac. 570; Gardner *v.* Tatum, 81 Cal. 370, 22 Pac. 880.

Georgia.— Murray *v.* Williams, 121 Ga. 63, 48 S. E. 686.

Indiana.— Orr *v.* Meek, 111 Ind. 40, 11 N. E. 787; Mayfield *v.* Nale, 26 Ind. App. 240, 59 N. E. 415.

Louisiana.— Dickerson *v.* Gordy, 5 Rob. 489.

Mississippi.— Bohn *v.* Lowery, 77 Miss. 424, 27 So. 604.

New York.— Accetta *v.* Zupa, 54 N. Y. App. Div. 33, 66 N. Y. Suppl. 303, 8 N. Y. Annot. Cas. 190; Fox *v.* Dixon, 12 N. Y. Suppl. 267; Timmerman *v.* Morrison, 14 Johns. 369.

Tennessee.— Haworth *v.* Montgomery, 91 Tenn. 16, 18 S. W. 399.

Texas.— Wooley *v.* Bell, 33 Tex. Civ. App. 399, 76 S. W. 797; Kenedy *v.* Schultz, 6 Tex. Civ. App. 461, 25 S. W. 667.

England.— De la Rosa *v.* Prieto, 16 C. B. N. S. 578, 10 Jur. N. S. 851, 33 L. J. C. P. 262, 10 L. T. Rep. N. S. 757, 12 Wkly. Rep. 1029, 111 E. C. L. 578.

See 39 Cent. Dig. tit. "Physicians and Surgeons," § 51.

Contra.— Smythe *v.* Hanson, 61 Mo. App. 285; Davidson *v.* Bohlman, 37 Mo. App. 576, was decided under a statute expressly prohibiting a recovery by unqualified practitioners.

A note given in consideration of services rendered by the payee as a physician, when he has not obtained a license, is void. Holland *v.* Adams, 21 Ala. 680; Coyle *v.* Campbell, 10 Ga. 570.

Practice under unauthorized temporary certificate.—A contract to render medical services, made by a physician who is practising under an unauthorized temporary certificate from one of a board of medical examiners, is not enforceable. Peterson *v.* Seagraves, 94 Tex. 390, 60 S. W. 751.

Certificate of good character.— One who is not allowed by law to collect his dues for medical or surgical services as a regular practitioner cannot recover compensation therefor, unless, prior to their performance, he obtained a certificate of good moral character, in the manner prescribed by Me. St. (1838) c. 353, § 2. Thompson *v.* Hazen, 25 Me. 104. Assumpsit lies on an express promise to pay for services rendered by one practising the healing art according to the methods of those calling themselves "Christian Scientists," plaintiff having complied with Me. Rev. St. c. 13, § 9, requiring persons not licensed by medical associations to obtain a certificate of good moral character from the officers of the town where they then reside. Wheeler *v.* Sawyer, (Me. 1888) 15 Atl. 67.

Qualification at time of trial sufficient.— In England it has been held that a physician may recover for his services, although not registered at the time they are rendered, if he appears to be duly registered at the time of the trial. Turner *v.* Reynall, 14 C. B. N. S. 328, 9 Jur. N. S. 1077, 32 L. J. C. P. 164, 8 L. T. Rep. N. S. 281, 11 Wkly. Rep. 700, 108 E. C. L. 328.

34. Maxwell *v.* Swigart, 48 Nebr. 789, 67 N. W. 789; Wickes-Nease *v.* Watts, 30 Tex. Civ. App. 515, 70 S. W. 1001.

prerequisite to the right to practise.[35] These decisions apply the principle that where a statute has for its manifest purpose the promotion of some object of public policy, and prohibits the carrying on of a profession, occupation, trade, or business, except in compliance with the statute, a contract made in violation of such statute cannot be enforced.[36] The mere fact that the practice of medicine is not punishable under the penal code, but is in violation of a civil statute, will render the contract void.[37]

b. Excuse For Failure to Qualify. A physician is not prevented from recovering for attendance before he had registered, where his delay in registering was owing to the registry clerk's negligence.[38] So also a physician practising without a license may maintain an action at law for his services, if, during the time of those services, there was no existing board of examiners.[39] But it has been held that a physician cannot recover for services rendered before the issuance of his certificate by the board, although he made application therefor before his employment began.[40]

c. Effect of Repeal or Amendment of Disqualifying Act. Where a disqualifying statute not only takes away all right of action for services performed by an unlicensed physician, but renders a contract to perform such services void in its inception, the repeal of such statute does not validate prior transactions, so as to enable the physician to recover compensation for services rendered by him before the passage of the repealing act.[41] The same rule applies where the disqualifying statute is amended so as to permit a certain excepted class of physicians to practise without a license.[42] Where, however, the disqualifying statute merely deprives an unlicensed physician of legal remedy for recovering compensation for his services, without preventing the accruement of a valid debt, then when such statute is repealed, which imposes this restraint upon the physician's remedy, he may maintain his action for services rendered prior to such repeal.[43]

d. Effect of Revival of Disqualifying Act. The revival of an act which invalidates the contracts of unlicensed physicians revives also the exception of the former act as to physicians practising at the time of its enactment; and hence a physician practising at the time of the revival may collect his fees, although not qualified thereunder.[44]

3. As Dependent on Beneficial Result of Services. In the absence of an express agreement, the right of a physician to be compensated for his services does not depend upon the measure of his success in effecting a cure by the means employed, but upon diligent exercise, under his employment, of the skill which commonly pertains to his profession. Such services are regarded as beneficial in a legal sense, and the right to adequate compensation arises upon their rendition, whether the outcome be in fact beneficial to the patient or otherwise.[45]

35. Riley *v.* Collins, 16 Colo. App. 280, 64 Pac. 1052; Finch *v.* Gridley, 25 Wend. (N. Y.) 469.

36. Haworth *v.* Montgomery, 91 Tenn. 16, 18 S. W. 399.

A penalty imposed by statute implies a prohibition, and a contract founded on its violation is void, although not so expressly declared by the statute. Harrison *v.* Jones, 80 Ala. 412. One cannot recover compensation for doing an act, to do which is forbidden by law, and is a misdemeanor. Fox *v.* Dixon, 12 N. Y. Suppl. 267.

37. Puckett *v.* Alexander, 102 N. C. 95, 8 S. E. 767, 3 L. R. A. 43; Kenedy *v.* Schultz, 6 Tex. Civ. App. 461, 25 S. W. 667.

Validity of contract of unlicensed physician see CONTRACTS, 9 Cyc. 478 text and note 6.

38. Parish *v.* Foss, 75 Ga. 439, Jackson, C. J., delivering the opinion of the court.

39. Woodside *v.* Baldwin, 30 Fed. Cas. No. 17,995, 4 Cranch C. C. 174.

40. Gardner *v.* Tatum, 81 Cal. 370, 22 Pac. 880, holding, however, that where the services are not rendered under an express contract, and the law implies a promise to pay for each visit as made, he may recover for services rendered the patient after the issuance of his certificate.

41. Quarles *v.* Evans, 7 La. Ann. 543; Bailey *v.* Mogg, 4 Den. (N. Y.) 60; Nicols *v.* Poulson, 6 Ohio 305; Warren *v.* Saxby, 12 Vt. 146.

42. Richardson *v.* Dorman, 28 Ala. 679; Puckett *v.* Alexander, 102 N. C. 95, 8 S. E. 767, 3 L. R. A. 43.

43. Hewitt *v.* Wilcox, 1 Metc. (Mass.) 154.

44. Maddox *v.* Boswell, 30 Ga. 38; Newsom *v.* Lindsey, 21 Ga. 365.

45. *Arkansas.*— Cotnam *v.* Wisdom, 83

4. As Dependent on Want of Skill or Negligence. Whether a physician is entitled to compensation for his services when he has failed to exercise ordinary skill or has been negligent in the treatment of a case is a question upon which there is a conflict of authority. One line of decisions takes the position that if a physician fails in his duty to exercise ordinary skill and care in treating a patient, he is guilty of a default in his undertaking, and can recover nothing for his services.[46] Other authorities hold that the fact that a physician was guilty of negligence in the treatment of his patient, resulting in damages to the latter, does not necessarily preclude him from recovering any compensation whatever for his services; the amount of his recovery, if anything, depending on the amount of damages suffered because of his negligence; in other words he may recover the value of his services less the amount of damages suffered by reason of his negligence.[47]

5. As Dependent on Place of Residence or of Performance of Services. The provisions of a statute regulating the practice of medicine and surgery apply to practitioners living without the state, as well as to those within it; and hence no physician or surgeon, although he may live without the state, will be entitled to recover fees for services rendered within it, unless previously licensed in the manner prescribed thereby.[48] An exception to this rule exists in the case of an emergency,[49] but the right to recover is not to be extended beyond the necessity of the actual emergency.[50] A statute prohibiting a recovery for medical services rendered by an unlicensed physician does not prevent a recovery in that state for services rendered in another;[51] but a contract by a physician duly qualified to practise in the province of Quebec, where he has his domicile, to render professional services in one of the United States, by the laws of which he is prohibited from practising, is illegal, and no recovery therefor can be had in the courts of such province.[52]

6. As Dependent on Intention That Service Should Be Gratuitous. Whether a

Ark. 601, 104 S. W. 164, 12 L. R. A. N. S. 1090.

Illinois.— Yunker *v.* Marshall, 65 Ill. App. 667.

New Jersey.— Ely *v.* Wilbur, 49 N. J. L. 685, 10 Atl. 358, 441, 60 Am. Rep. 668.

Pennsylvania.— Tiedeman *v.* Lœwengrund, 2 Wkly. Notes Cas. 272.

Wisconsin.— Ladd *v.* Witte, 116 Wis. 35, 92 N. W. 365.

England.— Hupe *v.* Phelps, 2 Stark. 480, 20 Rev. Rep. 726, 3 E. C. L. 496.

Although unsuccessful the physician may be entitled to compensation. McClallen *v.* Adams, 19 Pick. (Mass.) 333, 31 Am. Dec. 140; Leighton *v.* Sargent, 27 N. H. 460, 59 Am. Dec. 388, 31 N. H. 119, 64 Am. Dec. 323; Gallaher *v.* Thompson, Wright (Ohio) 466; McCandless *v.* McWha, 22 Pa. St. 261; Seare *v.* Prentice, 8 East 348; Hupe *v.* Phelps, 2 Stark. 480, 20 Rev. Rep. 726, 3 E. C. L. 496; Slater *v.* Baker, 2 Wils. C. P. 359.

46. Patten *v.* Wiggin, 51 Me. 594, 81 Am. Dec. 593; Bellinger *v.* Craigue, 31 Barb. (N. Y.) 534; Langolf *v.* Pfromer, 2 Phila. (Pa.) 17 (holding that a physician cannot recover a claim for professional services unless he possesses the requisite skill); Alder *v.* Buckley, 1 Swan (Tenn.) 69 (holding, however, that a surgeon is entitled to compensation for an operation not performed with the highest degree of skill, and which might have been performed more skilfully by others, provided the operation was beneficial to the patient).

Although a physician does not guarantee a cure, it seems that he should not be permitted to recover for worthless professional services, if he has been negligent, unskilful, or unfaithful. Logan *v.* Field, 192 Mo. 54, 90 S. W. 127.

A physician's contract is entire and performance is necessary to entitle the physician to recover anything. Bellinger *v.* Craigue, 31 Barb. (N. Y.) 534.

47. Whitesell *v.* Hill, 101 Iowa 629, 70 N. W. 750, 37 L. R. A. 830, (1896) 66 N. W. 894; Ressequie *v.* Byers, 52 Wis. 650, 9 N. W. 779, 38 Am. Rep. 775.

48. Spaulding *v.* Alford, 1 Pick. (Mass.) 33.

49. Adams County *v.* Cole, 9 Ind. App. 474, 36 N. E. 912, holding that a physician called from another county, as being the nearest physician with the requisite skill to perform an amputation immediately necessary to save a patient's life, and who had not sufficient time to procure the license required, can recover for the amputation, but not for subsequent visits, after he had time to procure a license.

50. Adams County *v.* Cole, 9 Ind. App. 474, 36 N. E. 912.

51. Downs *v.* Minchew, 30 Ala. 86, Stone, J., delivering the opinion of the court.

52. Rugg *v.* Lewis, 17 Quebec Super. Ct. 206.

physician's services shall be deemed a gratuity or constitute a claim for compensation must be determined, it has been held, by the common understanding of both parties. If they were intended to be and were accepted as a gift or act of benevolence, they cannot at the election of the physician create a legal obligation to pay.[53] But their character is not controlled by the inexpressed and revocable intentions of plaintiff, although his purposes subsequently asserted may aid in ascertaining it.[54] Where a physician renders services upon an understanding between the parties that he was to be remunerated by a legacy, this amounts to an agreement that he was to make no charge;[55] but if the services are performed under the mere expectation of a legacy, the physician is entitled, on being disappointed in his expectation, to recover compensation therefor.[56]

7. Under "No Cure No Pay" Contract. If a physician commence attending on a patient, under a contract that if there is no cure there shall be no pay, he cannot recover for his services or medicines, unless he shows a performance of the terms of the contract on his part.[57] When, however, a cure has been fairly effected, the contract cannot be evaded by the fact that the patient subsequently suffers a recurrence of the same disease.[58] Where the contract contains a condition that if a cure is not at first effected, the patient shall submit to further treatment, the physician is entitled to the agreed compensation, even though a cure is not effected, if the patient refuses or neglects to submit to further treatment.[59]

8. For Medicine Furnished. Under a statute which prohibits the practising of medicine by persons who have not complied with the provisions of the statute, it is unlawful for such unauthorized person to furnish medicine to another; and he is not entitled to recover for medicine so furnished.[60] Yet if he sells drugs and medicines apart from his professional business as a physician, he may recover for them.[61]

B. Liability For Compensation[62] — 1. Liability of Patient[63] — a. In General. Where a physician renders services to a patient, either under an express employment or with his consent, the law raises an implied promise on the part of the patient to pay him what the services are reasonably worth.[64] So also where, in a proper case, a physician renders services to a person without his request or consent, as where one is injured by an accident rendering him unconscious, the law

53. Prince v. McRae, 84 N. C. 674.
Services held to have been gratuitous see Packman v. Vivian, 24 Beav. 290, 53 Eng. Reprint 369.

54. Prince v. McRae, 84 N. C. 674. But see Kinner v. Tschirpe, 54 Mo. App. 575, holding that where a physician rendered services to a relative with the intention that such services should be gratuitous, he cannot recover compensation therefor, even though his patient expected to pay for them.

55. Shallcross v. Wright, 12 Beav. 558, 14 Jur. 1037, 19 L. J. Ch. 443, 50 Eng. Reprint 1174.

56. Baxter v. Gray, 11 L. J. C. P. 63, 3 M. & G. 771, 4 Scott N. R. 374, 42 E. C. L. 402.

57. Smith v. Hyde, 19 Vt. 54.

58. Fisk v. Townsend, 7 Yerg. (Tenn.) 146.

59. Madison v. Mangan, 77 Ill. App. 651

60. Underwood v. Scott, 43 Kan. 714, 23 Pac. 942; Smith v. Tracy, 2 Hall (N. Y.) 501; Bailey v. Mogg, 4 Den. (N. Y.) 60; Alcott v. Barber, 1 Wend. (N. Y.) 526; Timmerman v. Morrison, 14 Johns. (N. Y.) 369.

61. Holland v. Adams, 21 Ala. 680.

62. Physician's bill as part of wife's maintenance see Husband and Wife, 21 Cyc. 1608 note 66.

63. Contracts of infants for medical attendance see Infants, 22 Cyc. 594, text and note 57.
Liability of husband or wife for medical services see Husband and Wife, 21 Cyc. 1220, 1448.

64. Ostland v. Porter, 4 Dak. 98, 25 N. W. 731 (holding that simply removing a person affected with smallpox, who is not in indigent circumstances, to a county pest-house against his will, by order of the county commissioners, will not render him a pauper, and he may be held liable for medicines and medical attendance furnished by a physician who was employed by the county to attend paupers, when he accepts such services without objection, and receives the benefit thereof); Peck v. Hutchinson, 88 Iowa 320, 55 N. W. 511; Prince v. McRae, 84 N. C. 674; Garrey v. Stadler, 67 Wis. 512, 30 N. W. 787, 58 Am. Rep. 877.
Where a physician was summoned to attend his aunt, not in a professional capacity, but as an adviser in business matters, and on his arrival he rendered valuable profes-

will imply a promise from him who received the benefit of the services to pay for them.[65]

b. For Fees of Consultants. A patient is liable for the fees of a consulting physician as well as those of the attending physician.[66]

c. Conditional Contract. A conditional contract between a patient and his physician that if he effected a cure he should receive a reasonable compensation is valid.[67]

2. Liability of Person Employing Physician For Another[68] — a. In General. The rule that where a person requests the performance of a service and the request is complied with and the service performed, there is an implied promise to pay for the services, does not apply where a person requests a physician to perform services for a patient, unless the relation of that person to the patient is such as raises a legal obligation on his part to call in a physician and pay for the services,[69] or the circumstances are such as to show an intention on his part to pay for the services, it being so understood by him and the physician.[70] But in a few

sional services, which were accepted by the aunt, he is entitled to compensation. Dickey's Succession, 41 La. Ann. 1010, 6 So. 798.

65. Cotnam v. Wisdom, 83 Ark. 601, 104 S. W. 164, 12 L. R. A. N. S. 1090; Pray v. Stinson, 21 Me. 402.

66. Sherman's Estate, 6 Pa. Co. Ct. 225.

Extent of rule.— This has been held to be so notwithstanding an agreement between the patient and the attending physician that the latter would pay for such services, unless the consulting physician expressly or impliedly assents to such agreement. Shelton v. Johnson, 40 Iowa 84; Garrey v. Stadler, 67 Wis. 512, 30 N. W. 787, 58 Am. Rep. 877.

67. Mock v. Kelly, 3 Ala. 387.

A promise, made while sober, by a habitual drunkard to a physician, that he would pay him one hundred dollars, in consideration of which the physician promised and undertook to cure him of his appetite for ardent spirits, is binding. Fisk v. Townsend, 7 Yerg. (Tenn.) 146.

The mere fact that no compensation is agreed on in case the patient is cured does not transform the entire express contract into an implied one, so as to authorize recovery in case of failure to cure. Davidson v. Biermann, 27 Mo. App. 655.

68. **Liability of husband for medical services to wife** see Husband and Wife, 21 Cyc. 1220, 1448.

Liability of master: For treatment of apprentice see Apprentices, 3 Cyc. 552. For treatment of servant see Master and Servant, 26 Cyc. 1049.

Operation of statute of frauds to promises of third persons to pay for physician's services see Frauds, Statute of, 20 Cyc. 160 *et seq.*

Physician or surgeon for wounded employee, authority to employ, see Corporations, 10 Cyc. 926.

69. Starrett v. Miley, 79 Ill. App. 658; Holmes v. McKim, 109 Iowa 245, 80 N. W. 329; Williams v. Brickell, 37 Miss. 682, 75 Am. Dec. 88; Meisenbach v. Southern Cooperage, 45 Mo. App. 232. See also Shaw v. Graves, 79 Me. 166, 8 Atl. 884, holding that an action to recover for medical services rendered at the request and for the benefit of a person for whose support a bond has been given by defendants cannot be maintained against defendants, there being no implied authority on the part of such person to obtain such assistance at their expense or credit.

A special request by a father to a physician to attend upon a child of full age, for whom he is not bound to provide, although lying sick at the father's house, it has been held, raises no implied promise on the part of the father to pay for the services. Rankin v. Beale, 68 Mo. App. 325; Crane v. Baudouine, 55 N. Y. 256; Boyd v. Sappington, 4 Watts (Pa.) 247.

While a child is under no legal obligation to support a parent or receive him into his family, yet, if he does receive him into the family, he is *prima facie* responsible for services which he calls upon a physician to perform for the benefit of such parent. Hentig v. Kernke, 25 Kan. 559. Where parents conveyed property to their daughter in consideration of her agreement to support, and to pay for necessary medical services rendered them, a physician rendering necessary services to the parents can recover therefor from the daughter, although he first rendered his bill to the mother, without knowledge of the agreement. Rounsevel v. Osgood, 68 N. H. 418, 44 Atl. 535.

70. Dorion v. Jacobson, 113 Ill. App. 563; Smith v. Watson, 14 Vt. 332.

Illustrations.—Where W sent a telegraphic despatch to an infirmary as follows: "I have just learned of L.'s accident. Show him every attention, and I will pay expenses," it was held that the despatch authorized the procurement of a physician not connected with the infirmary, and obligated W to pay for whatever services were rendered by him. White v. Mastin, 38 Ala. 147. Where an employee of one of the members of a firm was seriously injured by machinery, and the person who telephoned to the surgeon, who thereupon attended such employee, testified that both the members of the firm directed him to say to the surgeon that the firm sent for him, a verdict against the firm for

states it is held that one who requests a physician to attend another professionally, without indicating that he acts as agent or messenger, is liable for the physician's charges.[71]

b. For Subsequent Visits. If one engages a physician to attend an urgent case, and makes no limitation as to time, he is liable to such physician for all subsequent visits, until his services are dispensed with.[72]

3. Third Person Assuming Liability After Services Begun. There is nothing in the ordinary relation between a physician and his patient which will prevent the former from discontinuing his services on the account of the latter, and entering into a contract with another for the payment of the charges for his subsequent attendance, and the assent of the patient to the making of such contract is not necessary.[73]

C. Amount of Compensation — 1. In General — a. In Absence of Contract. Where the services of a physician are performed on request, and no agreement is made in respect to them, the law raises an implied promise to pay so much as the services are reasonably worth.[74] There is no presumption of law as to the value of a physician's services,[75] nor that a jury can ascertain their value without testimony from persons knowing something about it.[76] The question of what is reasonable is peculiarly within the province of the jury;[77] but they have no right to ignore the testimony, and form an independent conclusion.[78] A physician can-

the surgeon's bill for such attendance should not be set aside as unsupported by the evidence. Till *v.* Redus, 79 Miss. 125, 29 So. 822.

Intention communicated to physician.— Where the physician is aware of the fact that one requesting his services acted merely as a messenger, and did not intend to make himself personally liable for the services to be rendered, there can of course be no recovery against the messenger. Smith *v.* Riddick, 50 N. C. 342. If, however, defendant intended, and gave the physician to understand that he was the employer, and the original credit was given to him, then he is liable. Clark *v.* Waterman, 7 Vt. 76, 29 Am. Dec. 150.

The reason of this rule is that to hold one liable under these circumstances would deter everyone from doing the charitable office of going after a doctor for a sick neighbor. Williams *v.* Brickell, 37 Miss. 682, 75 Am. Dec. 88; Meisenbach *v.* Southern Cooperage Co., 45 Mo. App. 232; Smith *v.* Riddick, 50 N. C. 342.

71. Foster *v.* Meeks, 18 Misc. (N. Y.) 461, 41 N. Y. Suppl. 950. See also Grattop *v.* Rowheder, 1 Nebr. (Unoff.) 660, 95 N. W. 679 (holding that one who calls a physician for a member of his family, although not a relative, is liable for services rendered, without notice that the party who calls him does not intend to make himself liable); Best *v.* McAuslan, 27 R. I. 107, 60 Atl. 774.

Illustration.— Where a person calls at the office of a physician, and in the absence of the latter leaves his business card, with this message written on it, "Call on Mrs. D. at No. 769 Broadway," and gives the card to a clerk in the office with a request to hand it to the physician and to tell him to "come as soon as possible," he becomes liable to pay the physician's bill in attending on Mrs. D in pursuance of such message. Bradley *v.* Dodge, 45 How. Pr. (N. Y.) 57.

72. Dale *v.* Donaldson Lumber Co., 48 Ark. 188, 2 S. W. 703, 3 Am. St. Rep. 224.

73. White *v.* Mastin, 38 Ala. 147.

74. Starrett *v.* Miley, 79 Ill. App. 658; Peck *v.* Martin, 17 Ind. 115; Morrell *v.* Lawrence, 203 Mo. 363, 101 S. W. 571.

Where a patient requires unusual attention, compensation for operations and time spent in addition to the regular visits is properly allowed. Short's Succession, 45 La. Ann. 1485, 14 So. 184.

A violation of his contract by a physician should be taken into consideration to reduce a claim for services rendered. Sayles *v.* FitzGerald, 72 Conn. 391, 44 Atl. 733 (holding that, in an action by a physician for services, testimony in defense that an operation was performed in the cellar, and that it was an unfit place for the operation, was competent on the question of the reasonableness of plaintiff's charge therefor); Piper *v.* Menifee, 12 B. Mon. (Ky.) 465, 54 Am. Dec. 547.

75. Wood *v.* Barker, 49 Mich. 295, 13 N. W. 597.

76. Wood *v.* Barker, 49 Mich. 295, 13 N. W. 597.

77. Marshall *v.* Bahnsen, 1 Ga. App. 485, 57 S. E. 1006; Crumrine *v.* Austin, 133 Mich. 283, 94 N. W. 1057.

The infinite variety of the circumstances surrounding the performance of professional services precludes the establishment of any fixed rate of compensation which could be applied to more than a very restricted class of cases and the more common class of services. Heintz *v.* Cooper, (Cal. 1896) 47 Pac. 360.

The existence of epidemics does not authorize exorbitant fees. Collins *v.* Graves, 13 La. Ann. 95.

78. Wood *v.* Barker, 49 Mich. 295, 13 N. W. 597; Ladd *v.* Witte, 116 Wis. 35, 92 N. W. 365.

not sustain a claim for larger compensation for non-expert services than an ordinary man would be entitled to for the same services, on the ground alone that, as an expert in his profession, his time is more valuable than that of ordinary men.[79]

b. Under Contract. When a valid contract has been made as to the amount of the compensation to be paid for medical services, no question as to the actual value of the services can arise.[80]

2. Elements to Be Considered in Estimating Amount — a. Customary Charge. A physician is entitled to recover the ordinary and reasonable charges usually made for such services by members of the same profession of similar standing.[81] Therefore, to prove the value of such services, customary charges of physicians for like services in the same locality or neighborhood may be shown;[82] but proof of what plaintiff charged another person for similar services is not admissible,[83] except in connection with proof that such charge was made at his usual rate, and that this rate was known to defendant.[84]

b. Nature of Disease or Injury. It is competent for a physician to show the nature of his patient's disease or injury and its mode of treatment, in order to prove the value of his services.[85]

c. Professional Standing. In an action by a physician for professional services, he may show that his professional standing is high, as bearing on the value of his services,[86] provided his general professional reputation is drawn in question.[87]

d. Skill and Learning. Evidence of a physician's learning and skill is competent to be shown in estimating the value of his services.[88]

e. Daily Income. In determining the value of a physician's services it is immaterial what his average daily income from his profession was or had been.[89]

Where witnesses differ as to the proper charge for a physician's services, it has been held that the correct rule is to allow the lowest estimate. Duclos' Succession, 11 La. Ann. 406.

79. Chicago, etc., R. Co. *v.* Friend, 86 Ill. App. 157; Stockbridge *v.* Crooker, 34 Me. 349, 56 Am. Dec. 662.

But the jury may take into consideration the exhausting studies, and the time consumed and expense incurred in acquiring professional knowledge and skill. Stockbridge *v.* Crooker, 34 Me. 349, 56 Am. Dec. 662.

80. See cases cited *infra*, this note.

Where a sum is agreed upon with reference to the length of time the physician estimated the treatment would continue, the amount agreed upon may be recovered, although the treatment, which continued for some weeks thereafter, did not continue for the whole period estimated. Denenholz *v.* Kelly, 97 N. Y. Suppl. 389.

A promise not to charge more than a certain amount is binding. Thomas' Estate, 6 Pa. Co. Ct. 642.

A contract in the alternative is valid and enforceable. Doyle *v.* Edwards, 15 S. D. 648, 91 N. W. 322, holding that a contract to pay a physician from two hundred dollars to four hundred dollars for the performance of a surgical operation was binding and valid for two hundred dollars and the value of the services, up to four hundred dollars, upon proof of such value.

Money or certificate of skill.— Where a contract for medical treatment called for five thousand dollars in cash or a certificate of plaintiff's skill, it was held that the five thousand dollars was not a penalty for refusal of the certificate, and therefore, no certificate being given, such amount could be recovered as compensation for the services. Burgoon *v.* Johnson, 194 Pa. St. 61, 45 Atl. 65.

81. Marshall *v.* Bahnsen, 1 Ga. App. 485, 57 S. E. 1006.

82. Jonas *v.* King, 81 Ala. 285, 1 So. 591.

Different character of services.— Evidence as to the customary charge for services of a different character from those alleged in the complaint is inadmissible. Trenor *v.* Central Pac. R. Co., 50 Cal. 222.

83. Collins *v.* Fowler, 4 Ala. 647; Marshall *v.* Bahnsen, 1 Ga. App. 485, 57 S. E. 1006.

84. Paige *v.* Morgan, 28 Vt. 565, holding further that proof of his ordinary charge to other persons in the vicinity, and that his rates were well known and by defendant, is admissible, on the part of a physician, to show the amount which defendant impliedly promised to pay.

85. Kendall *v.* Grey, 2 Hilt (N. Y.) 300.

86. Marshall *v.* Bahnsen, 1 Ga. App. 485, 57 S. E. 1006; Lange *v.* Kearney, 4 N. Y. Suppl. 14 [*affirmed* in 127 N. Y. 676, 28 N. E. 255].

The extent of a physician's practice is admissible as tending to show his professional standing. Sills *v.* Cochems, 36 Colo. 524, 85 Pac. 1007.

87. Morrell *v.* Lawrence, 203 Mo. 363, 101 S. W. 571.

88. Heintz *v.* Cooper, (Cal. 1896) 47 Pac. 360; Morrell *v.* Lawrence, 203 Mo. 363, 101 S. W. 571; Millener *v.* Driggs, 10 N. Y. St. 237.

89. Marion County *v.* Chambers, 75 Ind. 409; Thomas *v.* Caulkett, 57 Mich. 392, 24 N. W. 154, 58 Am. Rep. 369.

f. Loss of Other Practice. In determining the compensation of a physician for services rendered in compliance with a patient's request to give them exclusively for a time, to the abandonment of other practice, the probable but not the actual loss in other practice may properly be considered.[90]

g. Financial Condition of Patient. There is a conflict in the authorities as to whether it is proper to prove the value of the estate of a person for whom medical services have been rendered, or the financial condition of the person receiving such services, to affect the reasonableness of the physician's charge. In some jurisdictions such evidence is held to be admissible for this purpose.[91] In others the financial condition of the patient may not be considered,[92] except in rebuttal of evidence from the other side attempting to show the custom of a lower standard,[93] or where there is evidence of a recognized usage, which has grown into a custom, to graduate professional charges in reference to the financial condition of the patient, so that it may be considered that the services were rendered and accepted in contemplation of it.[94] Whatever may be the true principle governing this matter in contracts, the financial condition of a patient cannot be considered where there is no contract and recovery is sustained on a legal fiction which raises a contract in order to afford a remedy which the justice of the case requires.[95]

8. Opinion Evidence. Physicians may give their opinions as experts as to the value of the services rendered in an action for compensation.[96] But one not a physician is not competent to express his opinion as to the value of such services.[97] Nor does it make any difference that a competent witness has previously, in his hearing, testified as to such value.[98]

D. Actions For Compensation[99] **— 1. Nature and Form of Remedy.** *Indebitatus assumpsit* lies on a physician's bill for medicines, travel, and attendance.[1]

2. Defenses. In a suit for services rendered by a physician to his patient, a showing that plaintiff's services were of no value, and that the treatment used was worthless and could not produce a cure, will in some jurisdictions defeat a recovery.[2] On this same ground a plea of recoupment or counter-claim, springing out of the contract, may be filed;[3] but a plea of set-off, based on a tort in giving defendant an overdose of medicine, has been held improper as matter of defense.[4] Intoxication sufficient to render a physician incompetent to perform his duty is a defense to an action for compensation; but one who, knowing of the intemperate habits of a physician, continues to employ him, cannot set up such defense.[5] The fact that a physician was unable, from illness, to render future

90. Maddin *v.* Head, 1 Lea (Tenn.) 664.

91. Haley's Succession, 50 La. Ann. 840, 24 So. 285; Czarnowski *v.* Zeyer, 35 La. Ann. 796.

92. Morrissett *v.* Wood, 123 Ala. 384, 26 So. 307, 82 Am. St. Rep. 127; Robinson *v.* Campbell, 47 Iowa 625.

93. Morrell *v.* Lawrence, 203 Mo. 363, 101 S. W. 571.

94. Morrissett *v.* Wood, 123 Ala. 384, 26 So. 307, 82 Am. St. Rep. 127; Lange *v.* Kearney, 9 N. Y. St. 793.

95. Cotnam *v.* Wisdom, 83 Ark. 601, 104 S. W. 164, 12 L. R. A. N. S. 1090, holding that the financial condition of the patient may not be considered on the question of amount of compensation of surgeons who were called and rendered services to the patient when unconscious from accident.

96. MacEvitt *v.* Maass, 64 N. Y. App. Div. 382, 72 N. Y. Suppl. 158 [*affirming* 33 Misc. 552, 67 N. Y. Suppl. 817].

This is so, although the witnesses state that they have no knowledge as to what other physicians charge for such services, but base their opinions on what they think the services are worth. Marion County *v.* Chambers, 75 Ind. 409.

97. Mock *v.* Kelly, 3 Ala. 387.

98. Mock *v.* Kelly, 3 Ala. 387.

99. Recovery of judgment for compensation as bar to action for malpractice see Judgments, 23 Cyc. 1205, 1206.

1. Pynchon *v.* Brewster, Quincy (Mass.) 224. But see Glover *v.* Le Testue, Quincy (Mass.) 225 note, holding that *indebitatus assumpsit* will not lie for visits and medicine where there was no contract for a certain price.

Assumpsit generally see Assumpsit, Action of, 4 Cyc. 317.

2. Logan *v.* Field, 75 Mo. App. 594. See also Coyne *v.* Baker, 2 Cal. App. 640, 84 Pac. 269.

In other words evidence that will sustain an action against a physician for malpractice will defeat his recovery in an action for compensation. Logan *v.* Field, 75 Mo. App. 594.

3. McKleroy *v.* Sewell, 73 Ga. 657.

4. McKleroy *v.* Sewell, 73 Ga. 657.

5. McKleroy *v.* Sewell, 73 Ga. 657.

professional services for which a note was given is a complete defense to an action on the note.[6] A statute prohibiting an unauthorized practitioner from recovering his fees may of course be pleaded in defense to an action therefor;[7] but the failure of a physician to register, under an ordinance imposing a penalty for practising in the city without having registered, is immaterial in such an action.[8]

3. Pleading[9] — a. Declaration or Complaint. In an action by a physician for services rendered, it is almost uniformly held that it will be presumed that he has complied with all statutory requirements essential to his authority to practise medicine, and the complaint need not allege such compliance.[10] An allegation of qualification at the time of filing the pleading is not a sufficient allegation of qualification and authority to engage in practice and recover compensation for services performed months before the commencement of the action.[11]

b. Plea or Answer. Want of authority to practice need not be specially pleaded in defense to an action for medical services rendered.[12] But to authorize the defense of recoupment or counter-claim, defendant should either plead the matter specially, or else plead the general issue, and, at the same time that plea is interposed, give notice of the special matter relied on.[13]

4. Issues and Proof. Malpractice, if given in evidence to defeat entirely a physician's claim, is admissible under the general issue without notice; if merely to reduce the claim, then notice should be given.[14] So where the answer in an action for medical services admits the services, but denies the value alleged, defendant may show under such allegation that the treatment by plaintiff was unskilful.[15] Under the common counts for a *quantum meruit*, it is competent for defendant to prove the real value of the services, or that they were of no value.[16] In an action by a physician for services, under an allegation that "plaintiff rendered professional services," he cannot prove services rendered by another physician acting for him.[17]

5. Evidence[18] — a. Presumptions and Burden of Proof — (I) *In General.* In an action by a physician to recover his fees, the burden is on him to prove that he is a physician, that he was employed as such by defendant, that he rendered the services alleged, and the value of such services. He need not prove their value to defendant.[19]

(II) *As to Qualification.* While there is some conflict in the decisions, the

6. Powell *v.* Newell, 59 Minn. 406, 61 N. W. 335.

7. Berry *v.* Scott, 2 Harr. & G. (Md.) 92.

In Maryland the statute prohibiting an unauthorized practitioner from recovering his fees cannot be availed of unless notice is given of intention to dispute the physician's claim. Berry *v.* Scott, 2 Harr. & G. 92.

8. Prietto *v.* Lewis, 11 Mo. App. 601.

9. **Pleading** generally see PLEADING.

The affidavit for arrest in action for medical services, in the Canadian practice, must allege that plaintiff is a duly registered physician. Turner *v.* Connelly, 35 Can. L. J. N. S. 540; Jones *v.* Gress, 25 U. C. Q. B. 594.

10. Lyford *v.* Martin, 79 Minn. 243, 82 N. W. 479; Webster *v.* Lamb, 15 S. D. 292, 89 N. W. 473. *Compare* Bedford Belt R. Co. *v.* McDonald, 12 Ind. App. 620, 40 N. E. 821.

As against objection to evidence. — A complaint in an action for services as physician is sufficient, as against an objection to evidence, although it does not allege that plaintiff received a diploma from some medical college, or was a member of a state or county medical society, as provided by Wis. Rev. St. § 1436. Rider *v.* Ashland County, 87 Wis. 160, 58 N. W. 236.

11. Westbrook *v.* Nelson, 64 Kan. 436, 67 Pac. 884.

12. Matthews *v.* Turner, 2 Stew. & P. (Ala.) 239.

Under the general issue in assumpsit, evidence of want of authority to practise may be given. Matthews *v.* Turner, 2 Stew. & P. (Ala.) 239.

13. McLure *v.* Hart, 19 Ark. 119.

14. See Schopen *v.* Baldwin, 83 Hun (N. Y.) 234, 31 N. Y. Suppl. 581.

15. Schopen *v.* Baldwin, 83 Hun (N. Y.) 234, 31 N. Y. Suppl. 581.

16. Jones *v.* King, 81 Ala. 285, 1 So. 591.

17. Sayles *v.* FitzGerald, 72 Conn. 391, 44 Atl. 733.

18. **Evidence** generally see EVIDENCE, 16 Cyc. 821.

19. Styles *v.* Tyler, 64 Conn. 432, 30 Atl. 165.

Medical services cannot be regarded other than as beneficial; they are so in a legal sense. Ely *v.* Wilbur, 49 N. J. L. 685, 10 Atl. 358, 60 Am. Rep. 668. See also *supra*, V, A, 1.

decided weight of authority seems to be in favor of the rule that in a suit for professional services a license or due qualification under the law will be presumed, and the burden of proving want of authority is upon defendant.[20]

(III) *As to Employment.* In an action for fees, the burden is on the physician to prove his employment.[21]

(IV) *As to Necessity of Visits.* In an action by a physician to recover the value of professional services, plaintiff is deemed the best and the proper judge of the necessity of frequent visits; and, in the absence of proof to the contrary, the court will presume that all the professional visits made were deemed necessary, and were properly made.[22]

(V) *As to Skill and Care.* In an action by a physician to recover for professional services the presumption is that such services were performed in an ordinarily skilful manner, and where want of such skill in their performance is alleged as a defense, the burden of proof is on defendant.[23] Furthermore, where want of skill and care is set up in defense to his action for services, the burden of proof is on defendant to show that no want of care on his own part tended to consummate the injury complained of by him.[24]

(VI) *As to Change of Liability For Services.* Where a physician in the beginning renders his services solely on his patient's responsibility, in the absence of a special contract, he has the right to discontinue, and enter into a contract with another to become responsible for his subsequent services, and in such case the burden is on him to show, not only a discontinuance, or a proposal to discontinue, but also an agreement on the part of the third person to become responsible.[25]

20. *Illinois.*—Jo Daviess County *v.* Staples, 108 Ill. App. 539; Good *v.* Lasher, 99 Ill. App. 653. *Compare* North Chicago St. R. Co. *v.* Cotton, 140 Ill. 486, 29 N. E. 899.

Iowa.— Lacy *v.* Kossuth County, 106 Iowa 16, 75 N. W. 689.

Louisiana.— Dickerson *v.* Gordy, 5 Rob. 489; Prevosty *v.* Nichols, 11 Mart. 21.

Montana.— Leggat *v.* Gerrick, 35 Mont. 91, 88 Pac. 788, 8 L. R. A. N. S. 1238.

Nebraska.— Cather *v.* Damerell, 5 Nebr. (Unoff.) 490, 99 N. W. 35.

New York.— Thompson *v.* Sayre, 1 Den. 175; McPherson *v.* Cheadell, 24 Wend. 15.

South Carolina.— Crane *v.* McLaw, 12 Rich. 129.

South Dakota.— Webster *v.* Lamb, 15 S. D. 292, 89 N. W. 473.

See 39 Cent. Dig. tit. "Physicians and Surgeons," § 56.

Contra.— Mays *v.* Williams, 27 Ala. 267; Adams *v.* Stewart, 5 Harr. (Del.) 144; Bower *v.* Smith, 8 Ga. 74; Dow *v.* Haley, 30 N. J. L. 354.

The reason why the license will be presumed, where there is no evidence to the contrary, rests upon the principle that, when an act is required by positive law to be done, the omission of which would be a misdemeanor, the law presumes that it has been done, and therefore the party relying on the omission must make some proof of it, although it be a negative. Chicago *v.* Wood, 24 Ill. App. 40; Leggat *v.* Gerrick, 35 Mont. 91, 88 Pac. 788, 8 L. R. A. N. S. 1238; Golder *v.* Lund, 50 Nebr. 867, 70 N. W. 379.

Where no restrictions imposed by statute. — In an action to recover for professional services as a veterinarian, plaintiff must prove his qualification in such profession, where the statute imposes no restrictions or qualifications on a person practising such profession. Conkey *v.* Carpenter, 106 Mich. 1, 63 N. W. 990.

An exception to the rule stated in the text has been made where the statute expressly provides that no action shall lie in favor of any person for services as physician unless he shall have been legally licensed prior to the rendering of the services claimed for. In such case it is necessary for plaintiff, in an action for medical services rendered, to prove that he was duly licensed in order to make out a *prima facie* case. Cooper *v.* Griffin, 13 Ind. App. 212, 40 N. E. 710.

21. Weldon *v.* Lehigh Valley Traction Co., 27 Pa. Super. Ct. 257, holding that where a physician brings an action against a street railway company to recover for professional services rendered to an injured passenger, and plaintiff avers that he was employed to render such service by the claim agent of defendant, the burden is on plaintiff to show that the claim agent had general authority to employ a physician, or special authority in the particular instance, or that his engagement of plaintiff was ratified by defendant, or that defendant had so held him out as its agent that it was estopped in denying his authority.

22. Todd *v.* Myres, 40 Cal. 355; Ebner *v.* Mackey, 186 Ill. 297, 57 N. E. 834, 78 Am. St. Rep. 280, 51 L. R. A. 298 [*affirming* 87 Ill. App. 306].

23. Styles *v.* Tyler, 64 Conn. 432, 30 Atl. 165; Robinson *v.* Campbell, 47 Iowa 625.

24. Baird *v.* Morford, 29 Iowa 531.

25. Curry *v.* Shelby, 90 Ala. 277, 7 So. 922.

(VII) *As to Promise to Compensate.* Medical attendance being valuable, the law presumes a promise to pay,[26] unless it clearly appears that the services rendered were intended to be gratuitous.[27]

b. Admissibility. In an action by a physician for professional services, evidence is admissible to prove or disprove the existence of a special contract;[28] to show want of skill on the part of the physician,[29] and that his treatment was of no benefit;[30] to show the understanding of the parties as to the person liable for the services rendered;[31] and to prove or disprove a promise to pay.[32] Evidence as to the result of the treatment by a physician subsequently employed is inadmissible, as his treatment cannot alter the value of plaintiff's services.[33] Irrelevant and immaterial evidence is of course inadmissible.[34]

c. Weight and Sufficiency. In an action by a physician for his fees, the customary rules as to the weight and sufficiency of the evidence apply.[35] It is not, however, necessary that all the items of a physician's account should be strictly proved;[36] he may recover by establishing the fact of his habit of keeping correct books of account, and that the account sued upon had been correctly copied from his books.[37] But evidence that plaintiff practised in defendant's family, and was seen going and returning from defendant's house, coupled with proof that the

26. *In re* Scott, 1 Redf. Surr. (N. Y.) 234.

27. Ross *v.* Ross, 6 Hun (N. Y.) 182, holding that where it appears that for a portion of the services included in a physician's account no charge was intended to be made, it cannot be presumed that it was intended to charge for the other portions. In this respect one part of the account cannot be legally distinguished from the other.

Affirmative evidence that the services were gratuitously rendered must be produced in order to defeat a claim for compensation. *In re* Scott, 1 Redf. Surr. (N. Y.) 234.

28. Hollywood *v.* Reed, 55 Mich. 308, 21 N. W. 313 (holding that one's financial condition is irrelevant to the question of whether he bargained with a physician on the "no cure no pay" basis); Doyle *v.* Edwards, 15 S. D. 648, 91 N. W. 322 (holding that in an action to recover for professional services under a special contract, a bill previously presented, not mentioning the contract, is inadmissible to disprove that such a contract was made).

Professional standing.— Evidence that a physician who is suing for services rendered is not of good repute is not competent to disprove his employment. Prietto *v.* Lewis, 11 Mo. App. 601; Jeffries *v.* Harris, 10 N. C. 105.

29. McDonald *v.* Harris, 131 Ala. 359, 31 So. 548, holding that evidence by the patient's wife that plaintiff had stated that he would effect a permanent cure in three months is admissible, but only for the purpose of showing a want of ordinary skill.

Evidence of declarations of plaintiff as to the character of deceased's complaint, and directions as to its treatment, made out of the presence and hearing of deceased, are relevant to show that plaintiff was mistaken in his diagnosis, and prescribed erroneous treatment. McDonald *v.* Harris, 131 Ala. 359, 31 So. 548.

Worthlessness of medicine used.— In an action by a physician to recover an agreed fee under a contract to cure defendant "or no pay," where it is shown that defendant refused to submit to treatment, defendant may prove that the medicine used was worthless, and to do so may compel plaintiff, on cross-examination, to testify as to the ingredients of which it was composed. Jonas *v.* King, 81 Ala. 285, 1 So. 591.

30. Pickler *v.* Caldwell, 86 Minn. 133, 90 N. W. 307.

31. Morrell *v.* Lawrence, 203 Mo. 363, 101 S. W. 571.

32. Bremerman *v.* Hayes, 9 Pa. Super. Ct. 8, holding that evidence that the ethics of the medical profession forbid physicians from charging each other for services, and that it was the custom of physicians in a particular locality not to charge for such service, is admissible to negative an implied promise of one physician to pay for services rendered by another.

33. Gardner *v.* Tatum, 81 Cal. 370, 22 Pac. 880.

34. Curry *v.* Shelby, 90 Ala. 277, 7 So. 922; Molt *v.* Hoover, (Ind. App. 1907) 81 N. E. 221; Kwiecinski *v.* Newman, 137 Mich. 287, 100 N. W. 391.

35. Simmons *v.* Means, 8 Sm. & M. (Miss.) 397.

Evidence held sufficient to support verdict for plaintiff see Brown *v.* Murrell, (Ark. 1891) 16 S. W. 478; Head *v.* American Bridge Co., 88 Minn. 81, 92 N. W. 467; Atchison, etc., R. Co. *v.* Jones, 9 Nebr. 67, 2 N. W. 363; MacEvitt *v.* Maass, 64 N. Y. App. Div. 382, 72 N. Y. Suppl. 158 [*affirming* 33 Misc. 552, 67 N. Y. Suppl. 817]; McBride *v.* Watts, 1 McCord (S. C.) 384.

Verdict held contrary to evidence see McCoy *v.* Fletcher, 89 N. Y. App. Div. 623, 85 N. Y. Suppl. 1022; Abrahams *v.* Koch, 88 N. Y. Suppl. 148; Abram *v.* Krakower, 84 N. Y. Suppl. 529.

36. Hazlip *v.* Leggett, 6 Sm. & M. (Miss.) 326.

37. Hazlip *v.* Leggett, 6 Sm. & M. (Miss.) 326.

items, as charged, were according to customary rules, will not create a legal presumption of indebtedness by defendant.[38] Conceding that a physician must prove his right to practise before he can collect his bill, slight evidence is sufficient as against one who called him.[39] A receipt "in full for medical services" is *prima facie* a satisfaction of the claim against the patient,[40] and the presumption of payment in full thus raised is not overcome by expert testimony that the services were worth more than the account receipted for.[41]

6. QUESTIONS FOR JURY.[42] It is for the jury to determine whether or not a physician has exercised reasonable care and skill in the treatment of his patient.[43]

7. INSTRUCTIONS. The instructions in an action by a physician for his fees must conform to the pleadings and the evidence,[44] and once given need not be repeated.[45] Where malpractice is relied upon as a defense, it is reversible error for the court to refuse to instruct the jury that, if they find as a fact plaintiff was guilty of malpractice, he cannot recover for such services.[46] An instruction is erroneous which confines the jury, in the determination of the value of the services rendered, to a consideration of the benefits resulting to defendant therefrom;[47] but in some jurisdictions an instruction that if the patient received no benefit, and the result was due to the physician's lack of skill or care or failure to exercise the same, he was entitled to no compensation, is proper.[48]

8. REVIEW. A verdict plainly against the evidence will be set aside.[49] Where the evidence is sufficient to raise an inference of malpractice, a verdict for defendant will not be disturbed.[50] Conceding the necessity of proof of due qualification by a physician in an action to recover for his services, the question cannot be raised for the first time in the appellate court.[51]

VI. MEDICAL SOCIETIES.[52]

A medical society, incorporated under the laws of the state, has the power to make by-laws, even in the absence of express authority, to regulate the conduct of its members, and provide for their admission and expulsion.[53] This power, even when conferred by statute, is not an arbitrary, unlimited power. The rules adopted must be reasonable, and adapted to the purposes of the society, and they

38. Simmons *v.* Means, 8 Sm. & M. (Miss.) 397.

39. Chicago, etc., R. Co. *v.* Smith, 21 Ill. App. 202, holding that where plaintiff testified, without objection, that he had practised since 1872, and that he had a certificate, as required by the state board, and it appeared that his name appeared on the register of physicians in the county clerk's office, it is enough as against defendant, who called him, and thereby recognized his right to practise.

40. Danziger *v.* Hoyt, 120 N. Y. 190, 24 N. E. 294 [*affirming* 46 Hun 270], holding that a receipt "in full for his medical services," given by a physician to the patient's mother, at whose request the services were rendered, and who was recognized by the physician as acting in the patient's behalf in making payment, is *prima facie* a satisfaction of the claim against the patient, although the latter did not authorize the payment.

41. Danziger *v.* Hoyt, 120 N. Y. 190, 24 N. E. 294 [*affirming* 46 Hun 270].

42. Value of services as question for jury see *supra*, V, C, 1, a.

43. Logan *v.* Field, 75 Mo. App. 594.

44. Hinkle *v.* Burt, 94 Ga. 506, 19 S. E. 828, holding that where defense is made on the theory that the services were worthless, there is no error in not instructing the jury on the subject of partial failure of consideration.

45. McKnight *v.* Detroit, etc., R. Co., 135 Mich. 307, 97 N. W. 772.

46. Abbott *v.* Mayfield, 8 Kan. App. 387, 56 Pac. 327.

47. Ladd *v.* Witte, 116 Wis. 35, 92 N. W. 365.

48. Logan *v.* Field, 75 Mo. App. 594.

49. Wheaton *v.* Johnson, 55 Ill. App. 53, holding that where, in an action for physician's services, the rendition of the services and the value thereof were not disputed, the only question raised being whether they were performed under an express contract to pay a certain sum therefor, a verdict for defendant will be reversed on appeal.

50. Brinkman *v.* Kursheedt, 84 N. Y. Suppl. 575.

51. Durand *v.* Grimes, 18 Ga. 693; Hudson *v.* Madison, 75 Ill. App. 442.

52. Medical college: Appointment of hospital physician by see HOSPITALS, 21 Cyc. 1108 note 22. Cannot enjoin board of health see INJUNCTIONS, 22 Cyc. 881 note 73.

53. Bryant *v.* District of Columbia Dental Soc., 26 App. Cas. (D. C.) 461.

An initiation fee may be demanded from physicians and surgeons becoming members

cannot be made contrary to or inconsistent with the laws of the state.[54] Furthermore, the code of medical ethics adopted is obligatory on members alone, and its non-observance previous to membership furnishes no legal cause either for exclusion or expulsion.[55] A medical society, being a body corporate, has the power of removal or expulsion of its members as an incident to its constitution; but it cannot be exercised without a previous conviction or indictment in a criminal court for the offense charged, except where the offense relates merely to the official or corporate character of the accused, and amounts to a breach of the conditions expressly or tacitly annexed to his franchise or office.[56] Whether or not a member has violated a by-law providing for expulsion for "unprofessional conduct" is a question to be determined by the corporation; and the courts cannot sit as appellate tribunals to review the judgments of the corporate authorities, unless their authority be transcended, or fraud or bad faith be shown.[57] A member of the medical society of a county who is expelled cannot resort to a court of law for relief until he has appealed to the state medical society, where such a method of procedure is provided for.[58]

PHYSIOLOGY. The science of the functions of all the different parts and organs of animals and plants, the offices they perform in the economy of the individual, their properties, etc.[1]

PIANOS. See, generally, EXEMPTIONS.

PIAZZA. An entrance of a dwelling-house.[2] (See ENTRY.)

PICCAGE. In English law, a term applied where the liberty of erecting a stall in a market is secured and the soil is broken in erecting the same.[3]

PICKED. Synonymous with selected.[4]

PICKER. A machine used in connection with the carpet industry.[5]

PICKET. See LABOR UNIONS.

PICKETING. See LABOR UNIONS.

PICKPOCKET. A thief, one who in a crowd or in other places steals from the pockets or person of another without putting him in fear.[6] (See, generally, LARCENY; ROBBERY.)

of county medical societies. People *v.* New York Medical Soc., 3 Wend. (N. Y.) 426.

54. People *v.* Erie County Medical Soc., 24 Barb. (N. Y.) 570, holding that a regulation fixing a tariff of fees for medical services was void, as being unreasonable and against public policy.

55. People *v.* Erie County Medical Soc., 32 N. Y. 187 [*affirming* 25 How. Pr. 333].

56. Fawcett *v.* Charles, 13 Wend. (N. Y.) 473, holding that a county medical society cannot expel or remove a member because he did not possess the requisite qualifications and obtained his admission by false pretenses.

57. Bryant *v.* District of Columbia Dental Soc., 26 App. Cas. (D. C.) 461 (holding that the action of the society in expelling a member will not be interfered with by the court, where it appears that the authorized procedure has been duly followed; and it is not essential that the evidence on which the charges are based shall have been submitted to the whole society); Gregg *v.* Massachusetts Medical Soc., 111 Mass. 185, 15 Am. Rep. 24 (holding that where the offense with which a member is charged is against his duty as an incorporator, it can only be tried by the corporation, and there can be no interference by injunction on a bill filed against the society).

58. People *v.* Dutchess County Medical Soc., 84 Hun (N. Y.) 448, 32 N. Y. Suppl. 415.

1. *In re* Hunter, 60 N. C. 372.

2. Henry *v.* State, 39 Ala. 679, 681, where it is said: "A piazza is not a house, and cannot be a dwelling-house. It may be attached to the house, and may, in some sense, be a part of the house; but it is not, of itself, a house. To be in such a piazza, is not to be in a house."

3. Draper *v.* Sperring, 10 C. B. N. S. 112, 123, 30 L. J. M. C. 225, 4 L. T. Rep. N. S. 365, 9 Wkly. Rep. 656, 100 E. C. L. 112.

4. Labbe *v.* Corbett, 69 Tex. 503, 507, 6 S. W. 808.

5. Creachen *v.* Bromley Bros.' Carpet Co., 209 Pa. St. 6, 7, 57 Atl. 1101, where the machine is described as "composed of a rotative cylinder with a number of projections — sharp steel projections — that come in contact with wool that is fed between two rollers, and that take the stock of wool from the apron. And while the rollers are holding it these flying projections of steel tear it apart and cause it to become disintegrated, so that it follows in the course of the manufacture.

6. Bouvier L. Dict. [*quoted* in State *v.* Dunn, 66 Kan. 483, 484, 71 Pac. 811].